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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE CITY OF HOUSTON, ET AL.,
Petitioners,
v.
HARRIS COUNTY OUTDOOR ADVERTISING ASSOCIATION, ET AL.,
Respondents.

Petition For Writ Of Certiorari To The Texas Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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92pp

QUESTIONS PRESENTED

1. Did the Texas Court of Appeals incorrectly decide an important issue of federal law, in a manner contrary to United States Supreme Court precedent when it affirmed the judgment of the trial court holding that Defendants had violated Plaintiffs' rights to procedural due process under the Fourteenth Amendment?

2. Were there any other grounds adequate to support the Texas Courts' Judgments under 42 U.S.C. § 1983 or the award of attorney's fees under 42 U.S.C. § 1988?

LIST OF ALL PARTIES TO THE PROCEEDINGS

A. Plaintiffs below and Respondents here:

Harris County Outdoor Advertising Association, on behalf of itself and its members; Gannett Outdoor Co. of Texas; Kelly Outdoor Advertising, Inc.; SignAd, Inc.; National Advertising Company; Patrick Media Group of Houston, Inc.; Outdoor Systems, Inc.; Ember Advertising; Maddison and Associates, Inc.; Sterling Outdoor Advertising, Inc.; Hagerman Outdoor Advertising Corporation; Robert Gourley; and Trans-State Outdoor Advertising Co., Inc.

B. Defendants below and Petitioners here:

The City of Houston, Texas; the Municipal Board on Sign Control of the City of Houston, Texas, and its members being sued in their official capacities, George Pierce, Carol Letz, Sam Stewart, Vanessa Henderson, and Bobby Bates; and J. Hal Caton, in his official capacity as Sign Administrator of the City of Houston, Texas.

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Petition For Writ Of Certiorari To The Texas Court Of Appeals

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OPINIONS BELOW

The Texas Court of Appeals' opinion, dated June 16, 1994, is published as *City of Houston v. Harris County Outdoor Advertising Association*, 879 S.W.2d 322 (Tex. App.--Houston [14th Dist.] 1994, writ denied). The order by the Supreme Court of Texas denying the Motion for Rehearing of denial of Defendants' application for writ of error is dated March 23, 1995. Both are reprinted in the Appendix. The Final Judgment of the trial court that was the subject of the appeal was dated August 26, 1992, and is also reprinted in the Appendix along with the trial court's findings of fact and conclusions of law.

OTHER REFERENCES

The parties will be referenced by their status before the state trial court as Plaintiffs and Defendants.

References to the opinion, judgments, and other rulings below will be to the Appendix.

STATEMENT OF JURISDICTION

The Court of Appeals' opinion was issued on June 16, 1994, and rehearing of the denial by the Supreme Court of Texas of Defendants' application for writ of error was denied on March 23, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a) by the timely filing of this Petition for Writ of Certiorari.

APPLICABLE CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. XIV, § 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPLICABLE STATUTORY PROVISIONS

42 U.S.C. § 1983:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988 (in pertinent part):

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause

is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 *et seq.*] the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*], or section 1398l of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

1. Introduction

This is an appeal from a state court judgment finding a violation of Plaintiffs' rights to procedural due process under the Fourteenth Amendment to the United States Constitution by charging an excessive fee for sign permits and predicating a recovery by Plaintiffs under 42 U.S.C. §§ 1983 and 1988 based upon this Court's decision in *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). This conclusion by the trial court (App. B, p. 53a) was affirmed by the Texas Fourteenth Court of Appeals (the "Texas Court of Appeals") in an opinion filed June 16, 1994 (App. A, p. 1a - 27a), published at 879 S.W.2d 322.

In so holding, the state courts erroneously concluded that there are no post-deprivation remedies under Texas law, sufficient to satisfy the requirements of *McKesson*, that would allow Plaintiffs to recover any excessive fees or improperly paid taxes. Because the Texas Court of Appeals incorrectly resolved an important issue of federal law by finding a right of recovery under 42 U.S.C. §§ 1983 and 1988 for what amounts to essentially a state law cause of action for which there exists an adequate remedy under state law, and both misconstrued and misapplied this Court's decision in *McKesson*, Petitioners, defendants below, now request a grant of certiorari to review the state court decision.

2. Proceedings Below

Plaintiffs, a trade organization of outdoor advertising companies and its constituent members, brought suit under 42 U.S.C. § 1983 against Defendants, City of Houston and its officials, for allegedly charging sign permit fees in excess of reasonable costs of regulation so as to constitute an unlawful occupation tax under Texas law. (App. A, pp. 1a - 2a). The trial court rendered judgment in Plaintiffs' favor, and Defendants appealed.

The Texas Court of Appeals affirmed on the ground that, because Defendants did not provide a pre-deprivation procedure for Plaintiffs to recoup such allegedly excessive fees, Defendants violated Plaintiffs' procedural due process rights under this Court's holding in *McKesson v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). (App. A, pp. 19a - 21a). The Texas Court of Appeals conceded that "[t]he fact that appellees were assessed an unlawful occupation tax in violation of the State Constitution does not by itself constitute a compensable injury under section 1983." (App. A, p.

18a, citations omitted). The Texas Court of Appeals further found, however, that there was neither a pre-deprivation nor a post-deprivation remedy available to Plaintiffs under Texas state law to challenge the validity of the fees or obtain relief, thus resulting in a violation of Plaintiffs' procedural due process rights in light of this Court's decision in *McKesson*. (App. A, p. 20a - 21a).

Defendants sought review of the decision of the Texas Court of Appeals by filing an application for writ of error with the Texas Supreme Court. The Texas Supreme Court denied the application for writ of error, and relief was finally denied by the overruling of Defendants' Motion for Rehearing by the Texas Supreme Court on March 23, 1995 (App. E, p. 65a).

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THE TEXAS COURT OF APPEALS INCORRECTLY DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW, IN A MANNER CONTRARY TO UNITED STATES SUPREME COURT PRECEDENT, WHEN IT AFFIRMED THE JUDGMENT OF THE TRIAL COURT HOLDING THAT DEFENDANTS HAD VIOLATED PLAINTIFFS' RIGHTS TO PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

It is readily apparent from the decision of the Texas Court of Appeals that the lower court has reached a decision regarding adequate procedural process in tax refund cases that is directly contrary to this Court's decision in *McKesson v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990).

The Texas Court of Appeals addressed only the procedural due process claim raised by Plaintiffs. Relying on *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), the Texas Court of Appeals held that, because Defendants did not have some type of administrative procedure that would allow Plaintiffs to recoup allegedly excessive permit fees, Defendants had automatically violated Plaintiffs' rights to procedural due process. App. A, at p. 19a. The Texas Court of Appeals' reliance on *McKesson* is misplaced. As discussed below, the taxpayers in *McKesson* were denied any mechanism -- judicial, administrative, or otherwise -- to recover unlawfully assessed taxes. In contrast, Texas does allow taxpayers to recover improperly assessed taxes or fees through the judicial system.

(a) ***McKesson only requires that taxpayers be given a meaningful post-deprivation remedy for unlawfully assessed taxes.***

In *McKesson*, the courts of Florida, after determining that a state excise tax violated the Commerce Clause of the United States Constitution, enjoined future enforcement of the rate. 496 U.S. at 25. The state courts declined, however, to "order a refund or any other form of relief for the taxes previously paid and timely challenged under the discriminatory scheme." *Id.* The Supreme Court held that this refusal to provide for any meaningful, backward-looking relief violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 31. In so ruling, however, the Court made it clear that a state "need not provide pre-deprivation process for the exaction of taxes." *Id.* at 37. Rather, under *McKesson*, a state may constitutionally "employ various financial sanctions and summary remedies . . . in order to encourage taxpayers to make timely payments *prior to resolution of any dispute over the validity of the tax assessment.*" *Id.* at 37 (emphasis added). Under *McKesson*,

therefore, a state is only obligated to provide a post-deprivation procedure for challenging and redressing unlawfully assessed taxes.

(b) Texas courts give taxpayers a meaningful post-deprivation remedy for unlawfully assessed taxes.

McKesson nowhere requires a separate, extra-judicial remedy allowing for a refund of illegally paid taxes; nor does *McKesson* hold that a post-deprivation, judicial remedy cannot be adequate to satisfy due process constraints. Indeed, the Supreme Court has repeatedly recognized that post-deprivation, judicial remedies provided by state courts can be adequate to satisfy the requirements of due process. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 534-35 (1984); *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). Moreover, the Supreme Court in *McKesson* disagreed only with the result of the State of Florida's post-deprivation judicial remedy for a refund, because the Florida court had denied the refund. The adequacy of a judicial post-deprivation remedy under due process constraints was not itself disputed by the Court. *McKesson Corporation v. Division of Alcoholic Beverage & Tobacco*, 496 U.S. 18, 39, n. 22 (1990).

Texas courts have long recognized the rights of its citizens to recoup taxes and fees that are illegally assessed by a municipality. Indeed, in *Crow v. City of Corpus Christi*, 209 S.W.2d 922 (Tex. 1948), where the plaintiffs sued for declaratory and injunctive relief, the Texas Supreme Court reversed an appellate court determination that the plaintiffs, who had paid their "gross receipts" taxes under duress, were not entitled to recover those taxes that had been unlawfully assessed by the City of Corpus Christi. The Court

explained: "The city received from the companies money to which it now appears it was not entitled and, under the circumstances detailed, it would not be just for the city to continue to retain the money." *Id.* at 925; *see also Rainey v. City of Tyler*, 213 S.W.2d 57, 59 (Tex. Civ. App.--Texarkana 1948, writ ref'd n.r.e.) ("[I]n Texas there can be no question but that . . . taxes paid to a municipal corporation, required to be paid under an invalid ordinance, under circumstances which are tantamount to compulsion or duress, are recoverable by a payor in a suit for that purpose."). Thus, it is clear that the State of Texas recognizes the right of a taxpayer to seek a refund of unlawfully assessed municipal taxes.

Under *McKesson*, this state court remedy is sufficient to satisfy the constraints of due process. Moreover, Defendant City of Houston, as an agent of the state, is entitled under Texas law to rely on state court procedures to satisfy the requirements of due process. *See Town of Ascarate v. Villalobos,* 148 Tex. 254, 263, 223 S.W.2d 945, 950 (1949) (a municipal corporation is considered an arm of the state). By holding otherwise, the Texas Court of Appeals has effectively forced municipalities, such as the City, to erect separate, administrative processes allowing regulated entities to challenge the validity of fees and taxes assessed by Defendants. *McKesson* does <u>not</u> require states or municipalities to implement such a two-layered relief process, and the decision of the Texas Court of Appeals seriously compromises the teachings of this Court in *McKesson* by forcing such a result based on a clearly erroneous view of federal constitutional law. Finally, and most importantly, the question of what minimum procedural process is "due" remains a question of federal law, not state law. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). The Texas Court of Appeals decision

clearly attempts to implant a wholly inappropriate standard of procedural due process in conflict with established United States Supreme Court precedent.

II

THERE WERE NO OTHER GROUNDS ADEQUATE TO SUPPORT THE TEXAS COURTS' JUDGMENTS UNDER 42 U.S.C. §1983 OR THE AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. § 1988.

Notwithstanding that Plaintiffs had available an adequate state law remedy for refund of any allegedly excessive fees, as discussed under part I above, Plaintiffs sought and were awarded recourse solely under 42 U.S.C. § 1983 for the purported constitutional violations. As the Texas Court of Appeals itself noted, however, "[t]he fact that appellees were assessed an unlawful occupation tax in violation of the State Constitution does not by itself constitute a compensable injury under section 1983." (App. A at p. 18a). Although the Texas Court of Appeals alluded to the City being a proper defendant in a Section 1983 action by virtue of constitutional violations other than procedural due process, as found by the trial court (App. A., at p. 19a), the Texas Court of Appeals, having asserted a procedural due process violation under *McKesson*, declined to address whether the trial court correctly found other federal constitutional violations by Defendants of Plaintiffs' rights of free speech, equal protection, and substantive due process. (App. A, p. 22a).

However, the trial court's findings of other purported constitutional violations (at App. B, pp. 54-55a) are plainly inadequate to support any alternative ground for recovery under 42 U.S.C. §§ 1983 and 1988, and are clearly in

conflict with established United States Supreme Court precedent regarding the protections afforded to commercial billboard advertising.

(a) The argument that Defendants have violated Plaintiffs' First Amendment rights is flawed.

The trial court found that, because "[o]utdoor advertising is a means of expression for a variety of commercial and non-commercial messages," Plaintiffs, who are engaged in such activities, "are members of the press" for First Amendment purposes. App. B, p. 35a. After concluding that Plaintiffs are members of the press, the trial court then relied on the Supreme Court's decision in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), to hold that the City's off-premise operating permit fees violates the "guaranty of the freedom of the press under the 1st Amendment to the United States Constitution." The trial court's reasoning was fundamentally flawed and completely inconsistent with the authority cited.

Minneapolis Star dealt with state taxation of speech that is at the core of the First Amendment -- *i.e.*, the taxation of newspapers. This case, by contrast, involved only adispute about the fees charged to two classes of outdoor signs - "off-premise" and "on-premise" (App. A, pp. 41a - 42a).

Although the trial court ultimately concluded that the regulatory operating permit fees charged to off-premise signs were "excessive," there are no findings whatsoever indicating that the fees in question were based on the content of advertising or any discrimination against non-commercial as opposed to commercial speech. Thus, Plaintiffs have not been singled out as "members of the press" in the way that

newspapers were singled out for a discriminatory tax in *Minneapolis Star*. In truth, Plaintiffs are not "members of the press" at all.

When properly analyzed, the permit fee schedule adopted by the City must be sustained under the First Amendment framework first enunciated by a plurality of the Court in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), for determining the validity of so-called "billboard" regulations. The fee schedule does not favor commercial speech over non-commercial speech, but instead only draws distinctions based on the location of signs ("off-premise" versus "on-premise"). Under *Metromedia*, such a distinction is clearly permissible. *See Messer v. City of Douglasville*, 975 F.2d 1505, 1509-10 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 2395 (1993); *Georgia Outdoor Advertising, Inc. v. City of Waynesville*, 833 F.2d 43, 45-46 (4th Cir. 1987). Moreover, to the extent that Plaintiffs are engaged in the "business" of outdoor advertising, as found by the Texas Court of Appeals (App. A, p. 2a), the Supreme Court has recognized that commercial expression is entitled to less protection than other forms of expression. *Metromedia, supra*, 453 U.S. at 507, citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). Accordingly, Plaintiffs' First Amendment claim is without merit.

(b) The contention that Defendants violated Plaintiffs' rights to equal protection is likewise meritless and inconsistent with Supreme Court precedent.

The principles enunciated in *Metromedia* also defeat Plaintiffs' equal protection claim. There, a plurality of the Court recognized that "offsite commercial billboards may be prohibited while onsite commercial billboards are permitted."

453 U.S. at 512. If the City can, consistent with *Metromedia*, prohibit all off-premise advertising signs, then surely it can charge a higher permit fee for those signs without violating Plaintiffs' rights to equal protection. After all, the Equal Protection Clause of the Fourteenth Amendment only guarantees that those who are similarly situated should be treated in a similar manner. 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW 18.2 (2d ed. 1992). "It does not reject the government's ability to classify persons or 'draw lines' in the creation and application of laws" -- provided the classification is not based on an impermissible ground, such as race. *Id. Metromedia* expressly recognizes the ability of municipalities to treat off-premise and on-premise signs differently. Thus, contrary to the trial court's conclusion, the City's off-premise operating permit fee does not violate Plaintiffs' rights to equal protection under the Fourteenth Amendment.

(c) There was no finding to support a contention that permit fees were "confiscatory" so as to violate any substantive due process claim under Section 1983.

The trial court made no findings of fact whatsoever that would tend to demonstrate that the amount the City charged for an off-premise operating permit fee ($179.00 on average for a three-year permit, or approximately $60 per year, per sign) impeded Plaintiffs' business opportunities in any way. Thus, the trial court's conclusion of law no. 8 (App. B, at p. 54a) is utterly without foundation. Without any evidence showing how the increased fees affected their profits or their ability to use the signs, Plaintiffs failed to demonstrate that the fees were "confiscatory" for purposes of substantive due process. This is not a case like *Houston Credit Sales Co. v. City of Trinity*, 269 S.W.2d 579 (Tex.

Civ. App.--Waco 1954, writ ref'd n.r.e.), where the fee charged by the City of Trinity ($10 per day) greatly exceeded the "collections" ($22 per week) of the regulated entity. Thus, the trial court clearly had no basis whatever in holding that the City's off-premise operating permit fee was "confiscatory" under substantive due process constraints.

(d) Plaintiffs should not have recovered attorney's fees under 42 U.S.C. § 1988 because the Texas Court of Appeals erroneously found Plaintiffs to have prevailed under 42 U.S.C. § 1983.

Plaintiffs in this case sought, and were awarded, substantial attorney's fees under 42 U.S.C. § 1988 (App. A, p. 2a). That section provides, in pertinent part, that "[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). Plaintiffs attempted to come within this provision by asserting various claims under 42 U.S.C. § 1983. Section 1983, in turn, requires Plaintiffs to prove that they were deprived of a right or privilege secured by the Constitution or laws of the United States. 42 U.S.C. § 1983; *see West v. Atkins*, 487 U.S. 42, 48 (1988). However, if the Texas courts incorrectly, as asserted above, sustained Plaintiffs' Section 1983 claims, then the award of attorney's fees under Section 1988 must also fail. *See*, *Kentucky v. Graham*, 473 U.S. 159, 165 (1985), holding that "liability on the merits and responsibility for fees go hand in hand, where a defendant has not been prevailed against either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant."

For the reasons enunciated above, even had the Texas Court of Appeals reached such alternative federal grounds of recovery, there would have clearly been no adequate basis for the recovery under the 42 U.S.C. § 1983 claims or the award of attorney's fees predicated thereupon.

CONCLUSION

The decision of the Texas courts seriously and mistakenly undermines United States Supreme Court precedent regarding the nature of federal constitutional and statutory remedies with respect to cases involving alleged unlawful taxation and distorts the standards of due process required. For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 21st day of June, 1995, true and correct copies of the foregoing instrument were forwarded by United States Mail, postage prepaid, to the following attorneys:

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APPENDIX A

Affirmed and Opinion filed June 16, 1994

In The
Fourteenth Court of Appeals

NO. A14-92-01123-CV

CITY OF HOUSTON, ET.AL., Appellants

V.

HARRIS COUNTY OUTDOOR ADVERTISING ASSOCIATION, ET AL., Appellees

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 87-00827

OPINION

This appeal involves the validity of certain assessments levied by the City of Houston pursuant to the City's sign ordinance (the Sign Code). *See* Houston Tex., Sign Code Ch. 46. Appellees, Harris County Outdoor Advertising Association (HCOAA) and its individual members brought suit under 42 U.S.C. §1983, claiming that appellants, the City of Houston, members of the City's Municipal Board on Sign Control, and the City's Sign Administrator (hereinafter referred to as "the City"), violated their constitutional rights by charging excessive operating permit fees for off-premise signs. Appellees sought monetary, declaratory, and injunctive relief. The case was tried before the court which found in favor of appellees and

rendered judgment awarding monetary damages and attorney's fees. The court also made extensive findings of fact and conclusions of law, finding that the fees charged by the City between 1985 and 1992 for off-premise operating permits were excessive and in the nature of an unlawful occupation tax in violation of article VIII, section 1(f) of the Texas Constitution and provisions of the U.S. Constitution. The City appeals from the judgment and raises six points of error attacking the court's findings. We affirm.

Appellees are engaged in the business of outdoor advertising which involves the ownership and operation of billboards throughout Houston and the surrounding area. Billboards are "off-premise" signs. *See* Sign Code §§ 4603(2), 4612.

Appellees originally filed this suit on January 9, 1987. In their Original Petition, they alleged that the City's enforcement of the Sign Code including the assessment of substantial permit fees, was in violation of state and federal law and in violation of the Texas and U.S. Constitutions. Following the enactment of City Ordinance No. 89-767, which doubled the fee for an off-premise operating permit, appellees amended their petition to specifically allege that the City's fees for those permits were excessive and constituted an unauthorized and unlawful tax in violation of the Texas and U.S. Constitutions. Appellees continued to pay under protest one-half of the new fee for an off-premise operating permit to the City and the other half to the registry of the court. By agreed motion, appellees' excessive fee claim was severed and tried before the court beginning on July 20, 1992.

On August 26, 1992, the trial court rendered judgment for appellees. In its Final Judgment, the court found that the City's fees for off-premise operating permits

were unreasonably high, unconstitutionally excessive and that $40.00 was a reasonable and constitutional fee. The court awarded appellees $1,403,034.40 as damages. The judgment recites that this figure was computed by subtracting $40.00 (the permit fee declared to be reasonable) from $120.44 (the average permit fee paid by appellees between January 1985 and July 27, 1992) and multiplying that figure by 17,442 (the number of permits purchased by appellees during that period). The court further awarded appellees $326,582.98 in attorney's fees pursuant to 42 U.S.C. § 1988, along with conditional appellate attorney's fees. Finally, in addition to post-judgment interest and court costs, the court awarded appellees $751,732.93, the monies deposited in the registry of the court including interest. The City filed a notice of appeal.

In its first point of error, the City contends that the evidence was legally and factually insufficient to support the trial court's conclusion that the fees for off-premise operating permits constituted an impermissible occupation tax rather than a valid license fee.

As we observed at the outset, the trial court found that a portion of the fees charged by the City for off-premise operating permits constituted an occupation tax and violated article VIII, section(f) of the Texas Constitution. That section provides:

> The occupation tax levied by any county, city or town for any year on persons or corporations pursuing any profession or business, shall not exceed one-half of the tax levied by the State for the same period on such profession or business.

TEX. CONST. art VII, § 1(f).

This provision prohibits a municipality from levying an occupation tax where no such tax has been previously levied by the State. *Hoefling v. City of San Antonio*, 85 Tex. 228, 20 S.W. 85, 88-89 (1892); *Pierce v. City of Stephenville*, 206 S.W.2d 848, 850 (Tex. App.--Eastland 1948, no writ). As the trial court correctly found, the State of Texas has not levied an occupation tax on the off-premise sign industry. Therefore, if the fees for off-premise operating permits constitute an occupation tax, as the trial court found, the City violated article VIII, section 1(f) by levying such a tax on appellees.

To determine whether an exaction authorized by statute or ordinance constitutes an occupation tax or a license fee, the test is whether the primary purpose of the exaction, when the statute or ordinance is considered as a whole, is for regulation or for raising revenue. *Hurt v. Cooper*, 130 Tex. 433, 110 S.W.2d 896, 899 (1937); *City of Forth Worth v. Gulf Refining Co.*, 125 Tex. 512, 83 S.W.2d 610, 617 (1935). If the primary purpose of the exaction is for regulation, then it is a license fee; however, if the primary purpose of the exaction is to raise revenue, then it is an occupation tax, regardless of the name by which it is designated. *Hurt*, 110 S.W.2d at 899; *City of Fort Worth*, 83 S.W.2d at 617.

The City concedes that whether an exaction is for regulation or for raising revenue, involves the question of reasonableness and presents a question of fact. Statutes or ordinances imposing license fees under the police power to regulate are prima facie valid and are presumed to be reasonable. *Id.* at 618. Courts ordinarily will not interfere with this police power. *Id.* Before such legislation will be declared void, the unreasonable and oppressive nature of the

exaction must be clearly apparent from the record. *Id.* To be reasonable, a license fee *cannot be excessive nor more than reasonably necessary to cover the cost of granting the license and of exercising proper police regulation*, or *it must bear some reasonable relationship to the legitimate object of the licensing ordinance*. *Id.* [emphasis added] The nature of the business sought to be controlled and the necessity and character of the police regulations are the dominating elements in determining the reasonableness of the sum to be imposed. *Id.* (citation omitted) What would be fair and reasonable in one kind of business might well be considered unfair and unreasonable in another kind. *Id.* The burden of proving unreasonableness or oppressiveness is on the one who asserts it, usually the licensee. *Id.*

We hold that appellees have met their burden. As we stated, this case was tried before the court which made extensive findings of fact and conclusions of law. In particular, the trial court found no direct relationship between the payment of fees for off-premise operating permits and the receipt of services. The court also found that the revenue from such fees exceeded the reasonable costs of regulation. [1] The City attacks this finding and others relating to the court's determination that the fees in issue were an occupation tax. In a non-jury case, the trial court's findings of fact and conclusions of law have the same force and dignity as does a jury verdict on special issues. *Buzbee v. Castlewood Civic Club*, 737 S.W.2d 366, 368 (Tex. App.--Houston [14th Dist.] 1987, no writ). Findings of fact are reviewable for legal and factual sufficiency of the evidence

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[1] The City contends that the trial court applied the incorrect legal test. We find little or no distinction between the court's finding and the legal test first formulated in *City of Ft. Worth*. Whether an exaction is reasonably necessary to cover the costs of regulation requires an analysis of the relationship between fee revenue and costs of regulation.

supporting them and conclusions of law are reviewable when attacked as a matter of law, but not on grounds of factual sufficiency. *Id.*; *Mercer v. Bludworth*, 715 S.W.2d 693, 697 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.).

When both legal and factual sufficiency points are raised we must first examine the legal sufficiency. *Glover v. Texas Gen. Indem. Co.*, 619 S.W.2d 400, 410 (Tex. 1981). In reviewing a "no evidence" point, we are to consider only the evidence and inferences that tend to support the trial court's findings and disregard all evidence and inferences to the contrary. *Sherman v. First Nat'l Bank*, 760 S.W.2d 240, 242 (Tex. 1988). A "no evidence" point of error must be sustained when the record discloses one of the following: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla of evidence; or (4) the evidence establishes conclusively the opposite of a vital fact. *Otis Elevator Co. v. Joseph*, 749 S.W.2d 920, 923 (Tex. App.--Houston [1st Dist.] 1988, no writ) (citing *Commonwealth Lloyd's Ins. Co. v. Thomas*, 678 S.W.2d 278, 288 (Tex. App.--Fort Worth 1984, writ ref'd n.r.e.)). If there is any evidence of probative value to support the trial court's findings, we must uphold the findings and overrule the points of error. *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660, 661 (1951).

If the findings are supported by legally sufficient evidence, we must then review the factual sufficiency of the evidence by weighing and considering the evidence, in support of, and contrary to, the challenged findings. *Id.* The trial court's findings must be upheld unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust or erroneous. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 735 (Tex. 1988). Because the trier of

fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony, we may not substitute our judgment for that of the trial court's simply because we may disagree with the court's findings. *Hebert v. Hebert*, 754 S.W.2d 141, 142 (Tex. 1988); *Forscan v. Dresser Indus.*, 789 S.W.2d 389, 394 (Tex. App.-- Houston [14th Dist.] 1989, writ denied).

Stipulations made prior to trial reflect substantial increases levied upon appellees by the City's Sign Administration. We repeat the substance of those stipulations herein. The Sign Administration is part of the City's Public Works Department and was created when the Sign Code was enacted on May 8, 1980. *See id.* at §§ 4602, 4604. Between 1980 and 1989, the City enacted six ordinances which significantly increased the fees for operating permits for off-premise signs and/or on-premise signs. Since May of 1980, the annual fee for an off-premise operating permit has increased 450% from $20.00 to $90.00 for the first two hundred square feet. Before 1980, the City, through the Building Inspection Division, charged an annual fee of only $5.00 for the first twenty-five square feet, plus two cents for each excess square foot, for an off-premise operating permit. Currently, the average fee for a three-year, off-premise operating permit for a standard 14 foot x 48 foot off-premise sign is $278.00 or approximately $92.93 per year. Many signs are smaller than the standard size sign and the average fee for those signs is $179.00 for a three-year, off-premise operating permit or approximately $59.67 per year.

Before the last fee increase in 1989, the City commissioned a study by the accounting firm of Deloitte, Haskins and Sells (Deloitte or the Deloitte Study). The purpose of the Deloitte Study was to assist the Sign Administration in assessing its costs. Using its own

methodolgy, Deloitte identified certain services provided by the Sign Administration and determined the cost for each of these services along with the revenue generated by the City from various permit fees.

The Sign Administration's fee proposal to City Council was based in part on the Deloitte findings. That proposal projected $184.00 in costs associated with a three-year, off-premise operating permit and recommended a fee increase from an average of $89.50 to $179.00. Included in those costs were costs of non-revenue producing activities as well as other indirect departmental costs. These non-revenue producing activities included: (1) support of the Municipal Board on Sign Control (the Sign Board) which oversees enforcement of the Sign Code in the City's extra-territorial jurisdiction (ETJ), *see* Sign Code §§ 4613, 4616; (2) impoundment of illegal stick and paper signs in the rights-of-way, *see id.* at § 4604(k); and, (3) investigation of violations of the Sign Code, *see id.* at § 4604(b), (d). These activities rarely implicated appellees' businesses.

The proposal to Council regarding the cost allocation of non-revenue producing activities was made after meetings between the director of Public Works and members of the Houston Chamber of Commerce Committee on Signs, which included a member of the on-premise sign industry. The Chamber of Commerce's recommendations when compared to those of the Sign Administration, included fewer cuts in staffing, an increased cost allocation of impoundment activities to off-premise sign owners, and a smaller increase in fees for on-premise operating permits. The Sign Administration adopted all of the Chamber of Commerce's recommendations in its proposal to City Council.

Based upon that proposal, Council passed Ordinance No. 89-767, on May 24, 1989. The ordinance doubled the

fee for an off-premise operating permit previously in force from $45.00 to $90.00 for the first two hundred feet and from $.20 to $.40 for each excess square foot. As we noted, for most signs, the City's average fee for a three-year, off-premise operating permit doubled from $89.50 to $179.00, likewise increasing the City's recovery rate from 430.5% to 861%. The ordinance only slightly increased the fee for an on-premise operating permit from $.20 to $.27 for each square foot in excess of the first fifty square feet. The $15.00 charge for the first fifty square feet remained the same.

In light of these stipulations and other evidence offered by appellees, the City made no attempt to disavow these increases. Instead, the City took the position at trial that both the earlier fees and the current average fee of $179.00 for a three-year, off-premise operating permit were reasonable license fees as a matter of law because the revenue from those fees went solely to the City's regulation of the sign industry as authorized by the Sign Code. Thus, the question before this court is whether those fees were excessive or not reasonably necessary to cover the cost of granting the license and of exercising proper police regulation. *See City of Ft. Worth*, 83 S.W.2d at 618.

According to the City, any assessment under the guise of a license fee, no matter how prohibitive or tenuously connected to regulation, is reasonable as long as it relates to regulation. Were we to accept the City's position, any review of whether the assessment is in fact reasonably necessary to cover the cost of regulation would be prohibited. This is not the state of the law. While there is a presumption that legislative enactments pursuant to police power are valid and reasonable, that presumption does not preclude a factual review of the reasonableness of such enactments by the courts. *See e.g., Taylor v. State*, 513

S.W.2d 549, 550 n.1 (Tex Crim. App. 1974); *B & B Vending Co. v. City of El Paso*, 408 S.W.2d 545, 549 (Tex. App.--San Antonio 1966, writ ref'd n.r.e.); *Producers' Ass'n of San Antonio v. City of San Antonio*, 326 S.W.2d 222, 224 (Tex. App.--San Antonio 1959, writ ref'd n.r.e.); *Houston Credit Sales Co. v. City of Trinity*, 269 S.W.2d 579, 580-81 (Tex. App.--Waco 1954, writ ref'd n.r.e.).

The Deloitte Study

As we stated, the City commissioned the Deloitte firm to study the Sign Administration's costs and revenue. The results of that study were admitted into evidence. Appellees' expert, Charles Cooper, did a complete analysis of the Deloitte Study and his report was also admitted into evidence. The trial court's findings track much of Cooper's testimony concerning the Deloitte results. During that testimony, Cooper focused on Part II, section B of the Study pertaining to an overview of the methodology. That section provided that: "the methodology utilized in this analysis is guided by the principle that there is a direct relationship between payment of fees and charges and the receipt of services . . . the concept of 'all costs reasonably borne' underlies the study's full costing techniques." Based upon that language, Cooper concluded that the concept underlying the methodology of the Deloitte Study was that of a "user fee" or of "user defined services;" that is, there should be a direct relationship between the fee and the service or stated another way, only the user or recipient of the service should have to pay for that service. Cooper likened the user fees in this case to those paid at golf courses. Even the City's expert and the person who supervised the Deloitte Study, Fedor Derek, testified that the methodology underlying the Study was that of a "user fee" in the "generic sense" and that it required that there be a direct relationship between the payment of fees and the receipt of services.

Cooper also testified that the Deloitte Study found that the cost associated with an off-premise operating permit was $19.73, but that the revenue received by the City from an off-premise operating permit fee was on average, $89.50. He noted that an initial run of the Study completed on February 5, 1989, found that the cost associated with an off-premise operating permit was only $8.69 as compared to the average revenue of $89.50 from an off-premise operating permit fee. According to Cooper, under the initial run, revenue from all off-premise operating permit fees exceeded costs by $413,753.00 (a recovery rate of 1,030.5%). Cooper opined that those fees therefore, represented a general revenue raising measure.

After consulting with Sign Administration officials, Deloitte completed a second and final run of the study on March 16, 1989. Cooper testified that the cost associated with an off-premise operating permit found in the second run was higher because it improperly included indirect departmental costs and the costs associated with real estate signs, for which the City already charged a separate $100.00 operating permit fee. According to Cooper, under the second run, total revenue exceeded total costs by only $171,916.00 (a recovery rate of 430.5%). Cooper determined that such a recovery rate could only be characterized as "general revenue raising." Cooper also observed that the recovery rate should have been even higher because the cost associated with an off-premise operating permit should not have included the costs of real estate signs and therefore, should only have been $14.74. Cooper further pointed out that the Deloitte Study found that the revenue from the fee for an on-premise operating permit was on average only $28.75 or slightly more than the $23.14 cost associated with each permit. He also noted that the revenue from an off-premise operating permit fee was 4.5 times greater than the revenue from an on-premise operating permit fee.

The parties stipulated that the work directly connected to the issuance of an off-premise operating permit took approximately forty-five minutes and included one inspection of the sign, the issuance of the permit, and initial record keeping. Based upon that and other stipulations and the results of the City's own study, Cooper concluded that revenue from off-premise operating permit fees was unreasonably high or excessive and had no relation to the cost of services. Cooper's conclusions were essentially uncontroverted by the City's witnesses. In fact, the City's expert, Derek, conceded that "pricing or setting fees in the public sector" was outside his expertise. Thus, based upon the City's own study, the uncontroverted testimony of appellees' expert, and plaintiffs' exhibit number 11 admitted earlier to show the average fees paid by appellees from 1983 to 1992, there was sufficient evidence to support the trial court's finding that the fees for off-premise operating permits were so excessive as to constitute an impermissible occupation tax.

The City argues, citing *City of Ft. Worth*, 83 S.W.2d at 618, that the fact that the exaction may result in producing revenue in excess of that required for regulation, does not by itself destroy the regulatory character of a police measure. Thus, while Cooper's testimony alone concerning the Deloitte Study supports the trial court's finding of an impermissible occupation tax, appellees further sought to prove that the earlier fees and the fees set by Ordinance No. 89-767, were not so much intended to regulate the billboard industry as to raise revenue to remedy the Sign Administration's budget problems caused by its own inefficiency. As we described, Ordinance 89-767 doubled the average fee for a three-year. off-premise operating permit by allocating the costs of non-revenue producing activities to the cost of off-premise operating permit fees. Hence, much

of the trial focused on the fees set by that ordinance and on the Sign Administration's budget problems.

Improper Allocation of Costs

The Sign Administration is financed by the Sign Permitting Fund (Sign Fund) and is supposed to be self-supporting. *See id.* at § 4605(i). Sign owners and operators contribute to the Sign Fund through the payment of various permit fees. *See id.* at § 4605. All fees collected by the Sign Fund are used solely to pay administrative and other related costs of enforcing the Sign Code. *See id.* at § 4605(i). The Sign Fund is classified as one of the City's Special Revenue Funds. As such, the Sign Fund is used to account for proceeds from specific revenue sources and is legally restricted to expenditures for specific purposes. In contrast, the City's General Fund derives its revenue from ad valorem and sales taxes and pays for services provided to the general public such as police and fire protection.

In its finding of fact, the trial court found no direct relationship between the payment of fees for off-premise operating permits and receipt of services. The trial court also found that by charging the Sign Fun for loans from the General Fund and for the costs of litigation of sign issues, the City forced appellees to subsidize these costs for the benefit of the general public.

The Deloitte Study identified certain non-revenue producing activities performed by the Sign Administration, but it did not, according to Derek, analyze allocation of the costs of those activities. Notwithstanding the Deloitte findings, appellees' expert, Cooper, concluded that the $179.00 average fee set by Ordinance No. 89-767, had no direct relationship to the $19.73 cost found in the Deloitte Study, and therefore, was inconsistent with the "user fee"

methodology utilized in that study. He also concluded that the ordinance was nothing more than a general revenue raising measure because the fees set therein merely subsidized, at appellees' expense, the cost of services provided primarily to on-premise sign owners and operators and the general public. Cooper testified that because these non-revenue producing activities did not benefit appellees, it was improper to charge appellees for any of the costs of those activities.

Cooper described in some detail how these non-revenue producing activities did not benefit appellees and how the allocation of those costs to the cost of an off-premise operating permit was inconsistent with the methodology of the Deloitte Study and amounted to "general revenue raising." Cooper testified that because these activities provided little benefit to appellees, some or all them should have been performed by other City departments or eliminated altogether. Cooper also testified that these activities primarily benefitted the general public and should have been supported out the General Fund. Cooper further testified that it was improper to charge the Sign Fund for the indirect departmental costs associated with the repayment of loans and payment of legal costs, which Cooper asserted and the trial court found, were the result of the Sign Administration's own inefficiency and mistakes. Finally, documents from a City Councilmember and from private business interests which were admitted into evidence suggested that the billboard industry was politically unpopular and that off-premise operating permit fees were increased to eliminate the industry. Certainly, those documents, the Deloitte findings, and Cooper's cost analysis was "some evidence" that there was no direct relationship between the fees for off-premise operating permits and the receipts of services. The City, however, also contended that the evidence was factually insufficient to support that finding.

The City's witnesses, including Derek, former Sign Administrator, Ronald Hudson, and former Sign Administration manager, Richard Smith, testified that it was proper to charge appellees for the costs of the Sign Administration's non-revenue producing activities simply because the Sign Administration was authorized by the Sign Code to perform those activities. The City's witnesses acknowledged that the non-revenue producing activities benefit the public, but that "the public" includes sign owners who benefit from the "level playing field" created as a result of those activities. Concerning the allocation of indirect departmental costs, the City's witnesses stated only that those costs were properly passed on to appellees. Specifically, Derek testified that the concept of "all costs reasonably borne" recited in the Deloitte Study pertained to the allocation of direct and indirect costs to sign owners and operators, not to whether costs were reasonably borne by a particular payor of fees; in this case, billboard owners and operators. Former budget director for Public Works, John Baldwin, testified that revenue from fees was not diverted to other departments or to pay indirect costs, but was applied to cover the daily operating expenses of the Sign Administration. Finally, Ronald Hudson, who was responsible for pushing Ordinance No. 89-767 through City Council, denied that there was any consideration of raising permit fees beyond a party's ability to pay or to drive a particular party out of business.

The trial court, as the sole trier of fact, is free to resolve any conflicts or inconsistencies in the evidence. *See McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986). Here, the trial court, based upon the evidence, could reasonably have concluded that there was no direct relationship between the payment of fees for an off-premise operating permits and the receipt of services and that such fees were not reasonably necessary to cover the costs of

regulation, but were intended solely to raise revenue. *see also City of Ft. Worth*, 83 S.W.2d at 618.

Inefficiency, Waste, and Mismanagement

To further illustrate that fees for off-premise operating permits were excessive and merely to raise revenue, appellees presented several examples of the Sign Administration's inefficiency, waste, and mismanagement. Indeed, the trial court found that the Sign Administration was characterized by waste, mismanagement, and inefficiency. Appellees offered the following examples, many of which are incorporated in the trial court's finding of fact:

> (1) despite having regulatory responsibilities similar to that of the Sign Administration, the Building Inspection Division, which regulated signs before enactment of the Sign Code, never borrowed money, used fewer employees, and generally, incurred less costs and charged less for permit fees;
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> (2) since 1988, the Sign Administration has borrowed $725,000.00 from the General Fund to cover operating costs and still owes the General Fund $425,000.00, plus interest, all of which was charged to the Sign Fund;
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> (3) the $576,411.90 settlement in *City of Houston v. DeTrapani*, 771 S.W.2d 703 (Tex. App.--Houston [14th Dist.] 1989, no writ), plus $152,326.25 in attorney's fees from that and other cases were charged to the Sign Fund, which has yet reimburse the General Fund for payment of the settlement;
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> (4) the Sign Administration paid $5000.00 a month in rent for non-City owned office space;

(5) the City vehicles used by the Sign Administration had a high down-time;

(6) the Sign Administration was required to use the City garage, which "did not do a very good job, was incredibly slow, and charged high prices;"

(7) maintenance and repair problems were aggravated by an "unacceptable" absentee rate among Sign Administration employees and by the fact that the Sign Administration assigned City vehicles to those employees for home storage even though vehicle allowances was the preferred method of reimbursement under City policy;

(8) prior to the Deloitte Study, the City commissioned outside contractors to survey off-premise signs in the ETJ and to analyze city-wide costs, but neither study was used by the Sign Administration;

(9) budget shortfalls in the Sign Administration were due in part to the tri-annual renewal period and, though this problem was first recognized in 1983, the renewal period was not changed until 1989;

(10) despite budget shortfalls, the Sign Administration, with the passage of the 1989 ordinance, eliminated the on-premise permit fee for electrically, illuminated wall signs less than 100 square feet, resulting in a loss of revenue of approximately $90,000 per year; and

(11) Sign Administration staffing levels were well below that projected in its 1989 fee proposal and have been below the levels authorized by City Council each fiscal year.

Much of the evidence regarding the Sign Administration's budget problems and inefficiency was elicited from the City's witnesses during questioning by appellees' counsel. While the City offered some testimony on cross-examination and in the presentation of its case to explain or justify the Sign Administration's budget problems and inefficiency, much of that evidence was not directly rebutted by the City. Hence, there was sufficient evidence to support the trial court's findings that the Sign Administration was characterized by waste, mismanagement, and inefficiency. Based upon the evidence, the trial court could reasonably have concluded that the fees charged by the City's Sign Administration for off-premise operating permits were excessive and merely to raise revenue.

Having thoroughly reviewed the record in this case, we find sufficient evidence to support the trial court's findings that there was no direct relationship between the payment of fees for off-premise operating permits and the receipt of services. We further hold that the trial court properly concluded that the revenue generated by the City's fees for off-premise operating permits exceeded the reasonable cost of regulation and that such fees constituted an impermissible occupation tax. The City's first point of error is overruled.

In its second point of error, the City contends that the trial court erred in concluding that the fees for off-premises operating permits violated appellees' rights under the U.S. Constitution and consequently, that the City was liable under 42 U.S.C. § 1983.

The fact that appellees were assessed an unlawful occupation tax in violation of the State Constitution does not by itself constitute a compensable injury under section 1983. *See City of Grand Prairie v. Sisters of the Holy Family of*

Nazareth, 868 S.W.2d 835, 843 (Tex. App.--Dallas 1993, writ denied). To recover damages under section 1983, appellees were required to prove that they were deprived of a right or privilege secured by the Constitution or laws of the United States. 42 U.S.C. § 1983 (1981). There is no dispute that the City is a proper defendant under section 1983. *See id.* at 842 n. 3 (citing *City of Arlington v. Byrd*, 713 S.W.2d 224, 228 (Tex. App.--Fort Worth 1986, writ ref'd n.r.e.), *cert. denied*, 482 U.S. 929 (1987)). In the instant case, appellees alleged, and the trial court found, that the City committed multiple constitutional violations, including violations of free speech, procedural and substantive due process, and equal protection. U.S. Const. amends. I, V, XIV. Proof of any one of those constitutional violations, standing alone, was sufficient to allow appellees to recover under section 1983. *See* 42 U.S.C. § 1983.

The trial court found that the City violated appellees' right to due process under the Fourteenth Amendment to the U.S. Constitution "by failing to refund the portion of off-premise operating permit fees paid under duress that have been determined to be unconstitutionally excessive." In *McKesson v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 2247, 110 L.Ed.2d 17 (1990), the U.S. Supreme Court held that "if a State places a taxpayer under duress to promptly pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *McKesson* involved a wholesale liquor distributor who challenged Florida's excise liquor tax scheme on grounds that it violated the Commerce Clause of the U.S. Constitution by providing special tax rate reductions which favored distributors of local products. 110 S.Ct. 2242-44.

The Florida Supreme Court agreed and enjoined the State from giving future effect to those preferential rate reductions, thereby leaving all distributors subject to the same non-preferred rate. *Id.* at 2244. The court, however, refused to order a refund in the amount of excess taxes paid by the distributor as a result of its disfavored treatment or to provide the distributor with any other form of relief for the taxes previously paid. *Id.* The U.S. Supreme Court observed that while the government's strong interest in financial stability does not require a State to provide a pre-deprivation process for challenging an exaction of taxes, a State must, to satisfy the minimum requirements of the Due Process Clause, provide a meaningful post-deprivation process. *Id.* 2250-51. Further, in rejecting the State's equitable arguments in support of granting only a prospective remedy of non-preferential treatment, the court explained that a State "must provide taxpayers not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." *Id.* at 2251. Finally, the court noted that a "clear and certain" remedy could include a refund of the excess tax paid, an assessment against competitors who previously benefitted from the preferential tax rate, or a combination of both. *Id.* at 2252.

Thus, in the instant case, it was incumbent on appellees to show that they were without a meaningful opportunity to contest the validity of the tax assessed. *See Grand Prairie*, 868 S.W.2d at 845-46. Appellees were subject to financial sanctions for non-payment or late payment of off-premise operating permit fees. *See* HOUSTON. TEX., SIGN CODE ch. 46, §§ 4604(d), 4605(d), (i). It was undisputed that appellees paid those fees under protest and under duress. *See McKesson*, 110. S.Ct.

at 2251, n. 21. As we have discussed, those fees were correctly found by the trial court to be excessive and in the nature of an unlawful occupation tax. The Due Process Clause applies to any *unlawful collection* of taxes, including one that violates state law or provisions of the state Constitution. *See Smith v. Travis County Educ. Dist.*, 791 F.Supp. 1170, 1178 n. 5 (W.D. Tex.), *vacated on other grounds*, 968 F.2d 453 (1992). [emphasis in original] Despite the fact that appellees were required under threat of penalty to timely pay such a tax, there was neither a pre-deprivation nor post-deprivation procedure available for appellees to challenge the validity of that tax or to obtain "clear and certain" relief; in this case, refund of the excess tax paid.[2]

Appellees only course of action was to file this suit. *See Grand Prairie*, 868 S.W.2d at 846 (holding that section 1983 action is necessary to determine whether pre-deprivation procedure provided by State law is adequate to preserve taxpayer's right to due process of law).[3] By depriving appellees of their property without allowing them the opportunity to challenge that deprivation and to obtain

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[2] There is no dispute that only a refund provides appellees with "clear and certain" relief.

[3] Section 4604(e) of the Sign Code provides that "any person wishing to appeal a decision of the Sign Administrator on the grounds that the decision *misconstrues or wrongly interprets* this chapter" may do so. [emphasis added] Although exhaustion of an administrative remedy is not a prerequisite to an action under section 1983, the above provision of the Sign Code plainly does not provide a remedy for an invalid assessment of fees. *See Patsy v. Florida Board of Regents*, 457 U.S. 496, 516, 102 S.Ct. 2557, 2268, 73 L.Ed.2d 172 (1982). Our conclusion is consistent with the testimony of former HCOAA President, Rob Schmerler, that fee disputes between appellees and the Sign Administration were never the subject of appeals under the Sign Code.

relief, the City violated appellees' right to procedural due process under the Fourteenth Amendment to the U.S. Constitution. Thus, the trial court's finding was proper. Because this violation alone entitled appellees to recover under section 1983, we need not address whether the trial court correctly found other constitutional violations.[4] The City's second point of error is overruled.

In its third and fourth points of error, the City contends that the evidence is legally and factually insufficient to support the trial court's finding of $40.00 as a reasonable fee and that the trial court erred in "relating such a reasonable fee back to periods for which there is insufficient evidence to establish a reasonable fee."

The trial court found that "$40.00 represents the charge for recouping the reasonable costs of regulation for an off-premise operating permit, [and that] all sums levied in excess thereof are general revenue raising measures and an occupation tax." We are aware, as the City points out, that

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[4] In *Soldal v. Cook County, Illinois*, 113 S.Ct. 538, 542 (1992), the plaintiff brought suit under section 1983, alleging violations of both the Fourth and Fourteenth Amendments to the U.S. Constitution. The Seventh Circuit had previously held that no "seizure" within the meaning of the Fourth Amendment had occurred. 113 S.Ct. at 542. The lower court also had held that even if a "seizure" had occurred, the plaintiff's claim implicated only procedural due process rights; a ground not raised by the plaintiff. *Id.* at 542 n. 5. The U.S. Supreme Court stated that where multiple constitutional violations are alleged, courts should not as a preliminary matter attempt to identify the claim's "dominant character," but should examine each constitutional provision in turn. *Id.* at 548. However, *Soldal* is inopposite, not only because it involved an attempt by the lower court to re-characterize the plaintiff's claim, but also because it involved the denial of relief by that court. *Id.* at 542 n. 5. Here, we grant relief. Furthermore, our disposition of this point of error should not in any way be construed as giving importance to one constitutional right over another.

there is nothing in the record to show how the trial court arrived at the $40.00 figure. Indeed, the City's argument essentially is that the figure is without foundation in the record. We disagree.

While our review is of the sufficiency of the evidence under the standard previously stated, we note that the trier of fact has the discretion to award damages within the range of the evidence presented at trial. *See Neiman Marcus Group, Inc. v. Dworkin*, 919 F.2d 368, 372 (5th Cir. 1990); *see also Insurance Co. of North Am. v. Cangelosi*, 217 S.W.2d 888, 890 (Tex App.--Waco 1949, no writ). Here, evidence was admitted without objection of fees set by City Council dating back before 1980 and of the average fee paid by appellees dating back to 1983. More importantly, evidence was presented to the court that a reasonable fee for a three-year, off-premise operating permit, based upon each party's differing assessment of the costs to be included in that fee, was as high as $179.00 and as low as $14.74. Obviously, the court was given wide parameters within which it could exercise its discretion in arriving at a reasonable fee. That fact alone, however, does not mean that the court's determination of $40.00 as a reasonable fee was arbitrary.

In *Dworkin*, an employee sued his employer for breach of an employment contract. 919 F.2d at 369. There was a question of whether the employee's net earnings from his new employer were equal to, or exceeded, his earnings from his former employer thus, barring his recovery of lost compensation. *Id.* at 372. The jury heard evidence that the employee would have received $1.8 million in base salary and non-salary benefits from his old employer as compared to the base salary of $760,000.00 he actually received from his new employer. *Id.* at 373. The difference exceeded $1 million, but the jury awarded the employee $750,000. *Id.* Although the former employer disputed the employee's

entitlement to, and valuation of, non-salary benefits, the court held that there was sufficient evidence for the jury to assign a reasonable value to the employee's lost compensation and that the jury's award fell within the range of reasonableness established by the evidence. *Id.* at 374.

Similarly, *Cangelosi* involved a suit on an insurance policy to recover for the loss of bales of hay destroyed in a barn fire. *Id.* at 888. In determining the number of bales lost in the fire, the jury heard conflicting testimony on the dimensions of the barn and on the average size of a bale of hay. *Id.* 889-90. The jury also heard testimony that the barn at one time stored 4,000 bales. *Id.* at 890. Based upon the testimony of all the witnesses, the barn could have held anywhere from 931 to 10,000 bales of hay. *Id.* The jury's finding that the barn held approximately 4000 bales at the time of the fire was upheld by the appellate court because it was within the range of evidence presented. *Id.*

In the instant case, appellees put on evidence that they paid over $1.9 million in excessive off-premise operating permit fees between 1983 and 1992. Based upon that evidence, most notably, plaintiffs' exhibit number 11, and upon the testimony of their expert, appellees calculated that $114.45 was the average permit fee paid during that time. Appellees subtracted $14.74, the permit fee which they contended was reasonable, from $114.45, resulting in a difference or overpayment of $99.61 per permit. Appellees then multiplied 19,918, the total number of permits purchased between 1983 and 1992, times $99.61 for a product of $1,984.031.96. The City did not dispute this calculation or offer any of its own figures or calculations.

As described in the court's judgment, it appears that the trial court attempted the same calculation, except that its figures go back only to 1985 and it included $40.00 as the

reasonable fee per permit. The trial court found that appellees paid over $1.4 million in excessive permit fees. That figure was less than what appellees claimed. We cannot say that the trial court's findings went beyond the bounds of reasonableness established by the evidence or that they exceeded the range of evidence presented at trial. *See Dworkin*, 919 F.2d at 374; *Cangelosi*, 217 S.W.2d at 890.[5] We hold that the evidence is sufficient to support the trial court's finding of $40.00 as a reasonable, off-premise operating permit fee. The City's third and fourth points of error are overruled.

In its fifth point of error, the City contends that the trial court erred in not limiting damages to the period of two years preceding the filing of appellees' First Amended

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[5] We are aware of the holding in *First State Bank v. Keilman*, 851 S.W.2d 914, 930-31 (Tex. App.--Austin 1993, writ denied), in which the court found insufficient evidence to support the jury's finding of unauthorized interest based upon the Keilmans' counterclaim of usury. In that case, the Keilmans claimed $7,161.44 in unauthorized interest while the bank claimed that no unauthorized interest was charged. 851 S.W.2d at 931. While noting that both parties provided a "relatively precise" method for calculating unauthorized interest, the court concluded that the jury's finding of $360.00 in unauthorized interest was inexplicable in light of the evidence presented at trial and that there was no rational basis for the jury's calculation. *Id.* The instant case is distinguishable on two counts. First, there was a rational basis for the court's calculation of damages in this case insofar as it was based upon the same calculation set forth in the record by appellees without objection by the City. Second, there was no precise method for calculating a "reasonable" fee. As we stated, the "reasonableness" of the fee turned upon the determination of the costs properly chargeable to appellees. While both parties presented evidence on that issue, neither side set out a method for the trial court to follow in calculating a fee and no such calculation by the court appears in the record. Nonetheless, the trial court could have concluded, consistent with the evidence and its findings, that certain costs could reasonably be charged to appellees in the cost of an off-premise operating permit fee.

Petition. Alternatively, the City contends that appellees should be limited to damages incurred since the May 24, 1989, the date of passage of Ordinance No. 89-767.

The trial court's calculation of damages in its findings of fact and the award of damages included in the Final Judgment date back to 1985. As we noted, appellees filed their Original Petition on January 9, 1987, and after the passage of Ordinance No. 89-767, amended that petition on July 14, 1989. At trial, the City argued that the amended pleading was "wholly based on a new, distinct or different transaction or occurrence" and thus, did not relate back to the Original Petition for the purpose of calculating damages for the two years preceding the filing of that pleading. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.068 (Vernon 1986). The City never asserted that appellees' cause of action was barred.

The trial court, in its conclusions of law, determined that appellees' First Amended Petition did relate back to the Original Petition for the purpose of calculating damages. However, we need not address whether appellees could recover damages dating back to 1985 because that issue was tried by consent. At the close of evidence, counsel for appellees moved for a trial amendment, pointing out to the court that evidence of damages dating back to 1985 was admitted without objection by the City attorney. Counsel's motion was unopposed by the City and the court granted the trial amendment. We hold that the granting of the trial amendment is dispositive of the City's claim that damages should not have been calculated back to 1985. *See* TEX. R. CIV. P. 66, 67. The City's fifth point of error is overruled.

In its sixth point of error, the City contends that the trial court erred in awarding attorney's fees "because it erroneously concluded that appellees should prevail on their constitutional claims."

The trial court concluded that appellees were entitled to recover attorney's fees "in prosecuting their civil rights claims against [the City], pursuant to section 1988 of the Civil Rights Act." As we stated, the court's Final Judgment awarded appellees both trial and conditional appellate attorney's fees. The City's only argument is that appellees should not be allowed to recover any attorney's fees because they should not have prevailed under section 1983. The City concedes, however, that section 1988 gives the court discretion to award reasonable attorney's fees incurred at trial or on appeal by a party who prevails in a section 1983 action. 42 U.S.C. § 1988(b) (Supp. 1994); *Grand Prairie*, 868 S.W.2d at 847. *Tasby v. Wright*, 550 F. Supp. 262, 269-70 (N.D. Tex. 1982). Because the trial court correctly found that the City charged appellees an unlawful occupation tax in violation of appellees' right to procedural due process and that appellees were entitled to recovery under section 1983, the trial court properly awarded trial and appellate attorney's fees to appellees. The City's sixth point of error is overruled and the trial court's judgment is affirmed.

/s/ J. Curtiss Brown
Chief Justice

Judgment rendered and Opinion filed June 16, 1994.

Panel consists of Chief Justice J. Curtiss Brown, and Justices Murphy and Ellis.

Publish - TEX. R. APP. P. 90

THE STATE OF TEXAS

COUNTY OF HARRIS

I, MARY JANE SMART, Clerk of the Fourteenth Court of Appeals, of the State of Texas, at Houston, do hereby certify that the preceding 24 page(s) contain a true and correct copy of Court's Opinion in the Cause No. A14-92-01123-CV, City of Houston, Et Al., Appellants
VS.
Harris County Outdoor Advertising Association, Et Al. Appellees from Harris County, and now do file in my office.

TO CERTIFY WHICH, I hereunto set my hand and affix the Seal of said Court of Appeals, at Houston this the 30th day of May, 1995.

MARY JANE SMART Clerk
By /s/ Alexander Jones Deputy

APPENDIX B

No. 87-00827

HARRIS COUNTY OUTDOOR ADVERTISING, et al.	§	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
VS.	§	
CITY OF HOUSTON, TEXAS, et al.	§	281ST JUDICIAL DISTRICT

FINAL JUDGMENT

On the 27th day of July, 1992, there came on for trial in the above-entitled and numbered cause. The Harris County Outdoor Advertising Association and its individual members, Gannett Outdoor Co. of Texas, Kelly Outdoor Advertising, Inc., SignAd, Inc., Marksco, National Advertising Company, Patrick Media Group of Houston, Inc., Outdoor Systems, Inc., Ember Advertising, Maddison & Associates, Inc. Sterling Outdoor Advertising, Inc., Hagerman Outdoor Advertising Corporation, Bob Gourley, Scanlin Signs, and Trans-State Outdoor Advertising Co., Inc., Plaintiffs herein, in person and by attorney of record appeared and announced ready for trial. The City of Houston, Texas, the Municipal Board on Sign Control of the City of Houston, and its member in their official capacities, George Pierce, Carol Letz, Sam Stewart, Vanessa Henderson, and Ralph Marks, and J. Hal Caton, in his official capacity as the Houston Sign Administrator, Defendants herein, in person and by attorney of record appeared and announced ready for trial. No party having requested a jury, the case proceeded to trial to the Court, and the parties closed on August 6, 1992. After considering the

pleadings, evidence, and arguments of counsel, it appears to the Court that a judgment should be rendered for Plaintiffs and against Defendants. Accordingly, the Court hereby,

ORDERS, ADJUDGES, and DECREES that judgment should be, and hereby is, rendered in favor of Plaintiffs and against Defendants, jointly and severally. It is further,

ORDERED, ADJUDGED, and DECLARED that the City of Houston's fee for off-premise sign operating permits is unreasonably high and unconstitutionally excessive, and that the reasonable and constitutional off-premise operating permit fee is $40.00. It is further,

ORDERED, ADJUDGED and DECREED that Plaintiffs have and recover from Defendants, jointly and severally, actual damages in the sum of $1,403,034.40, computed as follows: $120.44 (the average permit fee paid by the Plaintiffs between January 9, 1985 and July 27, 1992) minus $40.00 (the amount hereby declared to be reasonable) times 17,442 (the number of permits purchased by the Plaintiffs between January 9, 1985 and July 27, 1992). It is further,

ORDERED, ADJUDGED, and DECREED that Plaintiffs have and recover from Defendants, jointly and severally, reasonable and necessary attorneys' fees pursuant to 42 U.S.C. §1988 of $326,582.98 for services rendered from June 1, 1989 through the trial of this cause; $35,000.00 in the event of an appeal to the Court of Appeals; $15,000.00 in the event of an application for writ of error to the Texas Supreme Court, and the writ is not granted; and $10,000.00 in the event of an application for writ of error to the Texas Supreme Court, and the writ is granted. This

award of attorneys' fees is part of the judgment hereby rendered. It is further,

ORDERED, ADJUDGED, and DECREED that Plaintiffs have and recover from Defendants, jointly and severally, post judgment interest on the judgment hereby rendered at the legal rate of 10% from the date of this judgment until paid. It is further,

ORDERED, ADJUDGED, and DECREED that Plaintiffs have and recover from Defendants, jointly and severally, all costs of court incurred in the prosecution of this action. It is further,

ORDERED, ADJUDGED, and DECREED that Plaintiffs have all writs and orders necessary for the enforcement and collection of this judgment; provided, however, that collection of the monies awarded herein shall first be accomplished by releasing to the Plaintiffs the funds held in the Court Registry. Accordingly, the Clerk of the Court is hereby ordered to release to the Plaintiffs, or to Richard L. Rothfelder as their attorney, the funds held in the Court Registry, which on July 2, 1992, was the sum of $751,732.93, representing principal of $682,860.42 and interest of $68,872.51, which continues to accrue at the pro rata weighted daily rate as determined by the Harris County District Clerk's Trust Fund Department. It is further,

ORDERED, ADJUDGED, and DECREED that all relief not expressly granted herein is denied.

SIGNED this ____ day of Aug 26 1992

/s/ Louis M. Moore
JUDGE PRESIDING

NO. 87-00827

HARRIS COUNTY OUTDOOR ADVERTISING ASSOCIATION, et al.	§	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
VS.	§	
CITY OF HOUSTON, TEXAS, et al.	§	281ST JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSION OF LAW

The above-captioned case came on for trial before the Court without a jury on July 27, 1992. All parties and their attorneys appeared at the trial, and they closed their cases on August 6, 1992. After considering the pleadings, the evidence, the arguments and briefs of counsel, the Court makes the following findings of fact and conclusions of law. To the extent any finding of fact may be also a conclusion of law or any of the conclusions of law may be construed as a finding of fact, the Court intends the finding or conclusion to be construed in accordance with law.

DEFINITIONS

1. "Plaintiffs" mean the Harris County Outdoor Advertising Association, on behalf of itself and its members, Gannett Outdoor Co. of Texas, Kelly Outdoor Advertising, Inc., SignAd, Inc., Marksco, National Advertising Company, Patrick Media Group of Houston, Inc., Outdoor Systems, Inc., Ember Advertising, Maddison & Associates, Inc., Sterling Outdoor Advertising, Inc., Hagerman Outdoor Advertising Corporation, Bob Gourley, Scanlin Signs, and Trans-State Outdoor Advertising Co., Inc.

2. "Defendants" mean the City of Houston, Texas; Municipal Board on Sign Control of the City of Houston, and its members being sued in their official capacities, George Pierce, Carol Letz, Sam Stewart, Vanessa Henderson, and Ralph Marks, and J. Hal Caton, being sued in his official capacity as the Houston Sign Administrator.

3. "Houston Sign Code" or "Sign Code" means Chapter 46 of the Houston Uniform Building Code, originally enacted on May 8, 1980, and subsequently amended.

4. "HB 1330" or "House Bill 1330" means the state law passed by the Texas Legislature and approved by former Governor Mark White on May 31, 1985, currently codified in Chapter 216 of the Local Government Code.

5. "ETJ" means the extraterritorial jurisdiction of the City of Houston, as defined in the Municipal Annexation Act, TEX. REV. CIV. STAT. ANN. art. 970a.

6. "City" means the City of Houston, Texas.

7. "State" means the State of Texas.

8. "Board" means the Municipal Board on Sign Control of the City of Houston, the members of which were appointed by the Mayor of Houston pursuant to Article I, Section 3 of H.B. 1330.

9. "Sign Administration" means the Houston Sign Administration.

10. "Ordinance No. 89-767" means the ordinance passed by the Houston City Council and approved by the

Mayor of Houston on May 24, 1989, which among other things increased the permit fees for on- and off-premise signs.

11. "Sign" means any outdoor display, design, pictorial or other representation which shall be so constructed, placed, attached, painted, erected, fastened or manufactured in any manner whatsoever so that the same shall be used for advertising, as defined in Section 4602 of the Sign Code, Pursuant to Section 4619 of the Sign Code, structures devoted exclusively to political messages are not "signs".

12. "Off-premise sign" means any sign advertising a business, person, activity, goods, products or services not usually located on the premises where the sign is installed and maintained, or which directs persons to any location not on the premises, as defined in Section 4603(a)(2) of the Sign Code.

13. "On-premise sign" means any sign identifying or advertising the business, person, activity, goods, products or services primarily sold or offered for sale on the premises where the sign is installed and maintained when such premises is used for business purposes, as defined in Section 4603(a)(1) of the Sign Code.

14. "Real estate signs" means off-premise signs which advertise the sale or rental of real property or direct persons to the location of real property for sale or rental, which are limited to forty square feet in area, as defined in Section 4612(b) of the Sign Code.

15. "Deloitte" means the accounting firm of DeLoitte, Haskins & Sells hired by the City to conduct a

study of the costs and revenues of services, including the Sign Administration's.

Whenever used in these Findings and Conclusions, the terms defined above shall be given their defined meaning unless expressly stated otherwise.

FINDINGS OF FACT

1. Plaintiffs own and operate off-premise signs throughout the City and its ETJ.

2. The types of off-premise signs utilized by Plaintiffs are standardized outdoor advertising structures, commonly known as "billboards".

3. Outdoor advertising is a means of expression for a variety of commercial and non-commercial messages, and as such, Plaintiffs are member of the press.

4. Prior to the passage of the Sign Code on May 8, 1980, off-premise signs were regulated by the City's Building Inspection Division.

5. The Building Inspection Division employed far fewer employees in the regulation of off-premise signs than the Sign Administration does currently; specifically, no more than two employees were devoted exclusively to the regulation of off-premise signs, and approximately another six employees had responsibility for regulating off-premise signs along with all of the other buildings and structures regulated by the Building Inspection Division.

6. The Building Inspection Division incurred far less expense in the regulation of off-premise signs than the Sign Administration does currently.

7. The Building Inspection Division never had to borrow money from the General Fund or any other funding source or department within the City in connection with its regulation of off-premise signs.

8. The regulations on the height, size, and spacing of signs has remained similar during the regulation by both the Building Inspection Division and Sign Administration.

9. Prior to the passage of the Sign Code, the construction of new off-premise signs was still permitted, and therefore regulated by, the Building Inspection Division; whereas the construction of new off-premise signs was prohibited after passage of the Sign Code, and has therefore not been regulated by the Sign Administration.

10. Prior to passage of the Sign Code, the highest annual off-premise operating permit was $5 (previously $1) plus two cents for each square foot in excess of twenty-five square feet; whereas, the current off-premise operating permit costs $90.00 for the first two hundred square feet and forty cents for each square foot thereafter for a three year permit.

11. Prior to passage of the Sign Code, there were far fewer categories of permit fees applicable to off-premise signs than there is currently.

12. The Building Inspection Division regulated off-premise signs more efficiently and effectively than the Sign Administration does currently, despite its smaller staff, expenses, and revenues from permit fees, and larger regulatory responsibility for the construction of new off-premise signs.

13. The Sign Administration was created by the Sign Code, which was passed May 8, 1980.

14. The Sign Administration has had annual budgets in excess of $3 million.

15. The Sign Administration currently has 37 employees, but it has had as high as 77 in the past.

16. The Sign Administration has in the past utilized more City owned vehicles than it has employees, but it currently has 36 vehicles and 37 employees.

17. The Sign Administration incurs excessive down time and costs for repairs of vehicles at the City's garage, which takes too long and charges too much.

18. In 1985, the Sign Administration paid $185,000.00 to an outside contractor (Espey Huston) to survey off-premise signs located in the ETJ, and it has subsequently been forced to utilize Sign Administration employees and vehicles to reconduct the survey because of errors.

19. The cost study conducted by the firm of David M. Griffith in 1986, which was commissioned and paid for by the City, was useless and unintelligible, at least to Sign Administration management.

20. Until the passage of Ordinance No. 89-767, the City failed to stagger the three year operating permit fees, and instead simply raised fees, when the Sign Administration's cash flow was largely due to inconsistent, not insufficient, income.

21. The Sign Administration has failed to obtain assistance or funding from Solid Waste or other authorized departments for the impoundment of signs.

22. The Sign Administration is characterized by waste, mismanagement, and inefficiency, a few examples of which are demonstrated by the previous eight findings of fact.

23. The jurisdiction of the Sign Administration included the regulation of on-premise and off-premise signs located within the corporate limits of the City from passage of the Sign Code until passage of House Bill 1330 on May 31, 1985; thereafter, the Sign Administration's jurisdiction was expanded to include on-premise and off-premise signs located within the City's ETJ as well. However, in 1987, another state law was passed, the effect of which was to eliminate the Sign Administration's jurisdiction over ninety-five percent of the on-premise signs located in the ETJ, as the Harris County Engineering Department assumed exclusive jurisdiction over the on-premise signs that were located in both Harris County and the City's ETJ. Therefore, the Sign Administration currently has jurisdiction over off-premise signs located in both the ETJ and corporate limits of the City, and over on-premise signs located in the City's corporate limits and parts of the ETJ that do not overlap Harris County.

24. In 1985, immediately prior to expansion of the Sign Administration's jurisdiction into the ETJ, the Sign Administration had an authorization for 57 employees. Further, after the jurisdiction of the Sign Administration was expanded to include on-premise and off-premise signs in the ETJ, 77 individuals were employed. However, immediately after the Sign Administration lost jurisdiction over on-premise signs located in the ETJ and Harris County in 1987,

the Sign Administration's authorized staff was reduced to 57. Therefore, the identical number of authorized staff positions, 57, existed when the Sign Administration had jurisdiction over off-premise signs located only within the City's corporate limits as well as within its ETJ, meaning that no additional staffing expenses were incurred because of the expanded regulation of off-premise signs in the ETJ.

25. The Sign Permitting Fund was also created as part of the May 8, 1980 Sign Code.

26. Prior to passage of the Sign Code, the costs incurred by the Building Inspection Division in the regulation of off-premise signs were borne by the General Fund.

27. The Sign Permitting Fund is to be used solely to pay the costs of the Sign Administration and enforcement of the Sign Code, and it derives revenue solely from permit and license fees charged to sign owners and operators. Therefore, the Sign Administration is supposed to be "self-sufficient".

28. An off-premise operating permit fee is a type of user fee, which is based upon the concept that the recipient of services pays for the cost of rendering such services. For example, the off-premise operating permit holder pays a fee for the service of inspecting his off-premise sign in order to assure that it is safe and in conformance with the Sign Code.

29. Another simple example of a user fee is the greens fee that a golfer pays for the privilege of playing a round of golf on the City's golf course.

30. By contrast, the City's General Fund derives revenue from ad valorem and sales taxes in the City.

31. City services paid for out of the General Fund are those provided to the general public instead of specific users, such as police and fire protection.

32. The Sign Administration has not been able to remain "self sufficient", as it has been forced to borrow $725,000.00 from the General Fund over the last four years.

33. Since passage of the Sign Code, between 1980 and 1989, Houston has increased the permit fees applicable to signs six times.

34. The fees for off-premise operating permits have gone up 450% since passage of the Sign Code, from $20.00 to $90.00 for the first 200 square feet.

35. It now costs $278.00 for a three-year operating permit for a standard 14 foot x 48 foot off-premise sign or billboard; whereas, the annual fee before the Sign Code would have been $1.00 to $5.00 for such a sign.

36. The work directly connected with the issuance of an off-premise operating permit includes one inspection of the sign, the issuance of the permit, and maintenance of records, all of which takes approximately 45 minutes.

37. Prior to passage of Ordinance No. 89-767, the City hired DeLoitte to study City services.

38. Among other things, DeLoitte identified the services provided by the Sign Administration, and it determined the cost of providing each of these services and the revenues generated for providing each of these services.

39. In its final report to the City dated March 16, 1989, DeLoitte determined that the unit cost for an off-premise operating permit was $19.73.

40. In its final report to the City, DeLoitte determined that the revenue recovered by the City at the time (before passage of Ordinance No. 89-767) was $89.50 per unit for off-premise operating permits.

41. In its final report to the City, DeLoitte determined that the City had a recovery rate of 430.5% ($89.50 divided by $19.73) in connection with the revenues and costs for off-premise operating permit fees.

42. In its final report to the City, DeLoitte determined that the City on the average charged $171,916.00 over its costs for off-premise operating permits.

43. In its final report to the City, DeLoitte included in the schedule for off-premise operating permits real estate signs, which are different from traditional off-premise signs and have a separate permit fee of $100.00.

44. By Ordinance No. 89-767, passed by the City on May 24, 1989, the permit fee schedule applicable to on-premise and off-premise signs was amended.

45. One of the effects of Ordinance No. 89-767 was to double the fee for an off-premise operating permit, i.e., from an average of $89.50 to $179.00.

46. According to DeLoitte's analysis of the revenues and costs of off-premise operating permit fees, the doubling of these fees by the City would result in a recovery rate of 861% and $395,849.00 more in annual revenue than costs.

47. Another effect of Ordinance No. 89-767 was to slightly increase on-premise operating permit fees, i.e., twenty cents per square foot after the first fifty square feet to twenty-seven cents per square foot (the $15.00 charge for the first fifty square feet remain the same), or from an average of $28.75 to $33.00.

48. According to its final report to the City, DeLoitte determined that, before passage of Ordinance No. 89-767 , the average cost per unit for an on-premise operating permit was $23.14, compared to an average revenue per unit of $28.75.

49. Another effect of Ordinance No. 89-767 was to completely eliminate the on-premise sign category of electrically illuminated wall signs less than one hundred square feet, and this elimination amounted to a loss of approximately $90.000.00 per year in revenue attributable to on-premise signs.

50. The fee increase contained in Ordinance No. 89-767 was based, in part, upon the projected staffing costs for the Sign Administration as identified by DeLoitte. However, the Sign Administration is currently employing at least 17 1/2 fewer employees than the number identified by DeLoitte and utilized in the permit fees, which translates to a savings of over $414,888.00 per year. Therefore, the portion of the permit fees based upon projected staffing is over $414,888.00 higher than the Sign Administration's current staffing costs.

51. A political or management decision was made by the City to allocate the costs of performing certain "non-revenue activities" by the Sign Administration in the following fashion:

(a) Support of the Municipal Board on Sign Control - 100% of the $215,520.00 charge to off-premise operating permit fees;

(b) Impoundment - 50% or $114,473.00 of the charge to off-premise operating permit fees, and the other 50% to on-premise operating permit fees.

(c) Investigations - 30% or $87,310.00 of the charge to off-premise operating permit fees, and the remaining 70% to on-premise operating permit fees.

52. By allocating the costs of these three non-revenue activities in this fashion, City management raised the average cost of an off-premise operating permit from $19.73 to $184.00.

53. Management of the Public Works Department originally recommended that off-premise and on-premise operating permit fees be increased to $118.00 and $38.00, respectively. This fee recommendation was based upon DeLoitte original identification of the costs of off-premise and on-premise operating permits ($19.73 and $23.14, respectively), plus allocating investigation costs 30% to off-premise and 70% to on-premise, 100% of the cost of supporting the Board to off-premise, and 100% of impoundment cost to on-premise, along with a Sign Administration staffing of 44.

54. Subsequent to the Public Works' recommendation, the Houston Chamber of Commerce Committee on Signs made recommendations on the permit fee increase for off-premise and on-premise signs. Specifically, the Chamber of Commerce recommended an

off-premise operating fee of $184.00 and an on-premise operating permit fee of $33.00, which was determined by starting with DeLoitte's original cost figures for on-premise and off-premise signs, allocating impoundment costs 50% to on-premise and 50% to off-premise, investigations 30% to off-premise and 70% to on-premise, and Board support 100% to off-premise, along with a Sign Administration staffing of 47.

55. The Houston Chamber of Commerce Committee on Signs contained at least one representative of the on-premise sign industry, several representatives of businesses that use on-premise signs, and no representatives of the off-premise sign industry.

56. The City adopted the recommendations of the Houston Chamber of Commerce Committee on Signs in the passage of Ordinance No. 89-767.

57. The role of the Board is essentially to determine what signs must be conformed, when the conformance must occur, and how the conformance must be performed.

58. The off-premise sign operators exclusively pay for the cost of supporting the Board, rather than the general public paying for any of this service through the General Fund.

59. House Bill 1330, the State law that created the Board, applies equally to both on-premise and off-premise signs.

60. The Sign Administration has also incurred costs in connection with the support of the Board with regard

to on-premise signs. Currently, the Board is administering off-premise signs exclusively.

61. In 1985, the City failed to comply with House Bill 1330's requirement to identify all non-conforming on-premise signs located in the City's ETJ. However, the City did survey and identify the non-conforming off-premise signs located in the ETJ, including by the expenditure of $185,000.00 to Espey Huston to conduct the survey. While there was $200,000.00 left over from the $385,000.00 appropriation of City Council for Espey Huston's survey of off-premise signs in the ETJ, the Sign Administration elected not to use any of this money to survey on-premise signs in the ETJ.

62. None of the costs of supporting the Board was allocated to on-premise operating permit fees.

63. There is no provision in House Bill 1330 requiring the Sign Administration, as opposed to another City department, to provide support to the Board.

64. In the future, the efforts of the Board in connection with off-premise signs will be concluded, thereby terminating any further need for the Sign Administration to provide support to the Board as to off-premise signs. Nevertheless, there is no plan to reduce the off-premise operating permit fee, which currently includes 100% of the cost of supporting the Board, when the Board's duties are completed as to off-premise signs.

65. The recipient of the service provided by the Sign Administration in supporting the Board is the general public, and off-premise operating permit holders receive no more service from the Sign Administration's support of the Board than does the general public.

66. The allocation of 100% of the cost of supporting the Board to off-premise operating permits was incorrect, as there is no direct relationship between the receipt of this service and the payment of fees for the service.

67. By allocating 100% of the cost of supporting the Board to off-premise operating permits, the City has forced off-premise operating permit holders to subsidize the cost of this service for the benefit of on-premise operating permit holders and/or the general public, one or both of which are recipients of the service without any charge.

68. Impoundment is the service provided by the Sign Administration of picking up and destroying or storing illegal signs found in the right-of-way, primarily stick and paper signs advertising garage sales, politicians, and subdivisions.

69. None of the Plaintiffs' signs have ever been impounded by the Sign Administration.

70. No billboard has ever been impounded by the Sign Administration.

71. The Plaintiffs have already posted bonds in the amount of $25,000.00 each, designed to finance the removal of any of their signs determined to be illegal, as required under Section 4606(e) of the Sign Code.

72. Other departments, including traffic, police, and solid waste, are authorized under Section 4608(c)(2) of the Sign Code to perform the impoundment service.

73. No other City department besides the Sign Administration performs or helps pay for the impoundment service.

74. The recipient of the impoundment service is the general public, and off-premise operating permit holders receive no more service by the impoundment of signs than does the general public.

75. The general public does not pay any of the cost of providing the impoundment service by the Sign Administration; rather, it is shared equally by on- and off-premise sign owners and operators.

76. By allocating 50% of the cost of impoundment to off-premise operating permit fees, the City has forced off-premise operating permit holders to subsidize the cost of the service for the benefit of the general public, who is a recipient of the service at no charge.

77. The allocation of 50% of the cost of impoundment to off-premise operating permits was incorrect, as there is not a direct relationship between the receipt of the impoundment service by off-premise operating permit holders and their payment of fees for such service.

78. The service of investigations provided by the Sign Administration includes investigating violations of the Sign Code, and issuing citations or taking other punitive measures in response to such violations.

79. The vast majority of sign violations determined in connection with this investigation service are the unlicensed owners of businesses who place unpermitted signs advertising their businesses, rather than legitimate licensed sign operators like Plaintiffs.

80. The recipient of the investigation service is the general public, and off-premise operating permit holders receive no more from this service than does the general public.

81. The general public does not pay for any of this investigation service through the General Fund. Rather, all of the Sign Administration's costs in rendering this service are borne by on- and off-premise sign operators.

82. By allocating 30% of the cost of investigations to off-premise operating permits and none to the general public through the General Fund, the City has forced off-premise operating permit holders to subsidize the cost of the investigation service for the benefit of the general public, who is a recipient of the service at no charge.

83. It was incorrect to allocate 30% of the cost of investigations to off-premise operating permits, as there is not a direct relationship between the receipt of the investigation services by off-premise operating permit holders and their payment of fees for such services.

84. The $576,411.90 paid by the City in March 1990 in settlement of the *City of Houston, Texas and Ronald Hudson being sued in his official capacity as the Houston Sign Administrator, Appellants v. Joseph and Nancy DeTrapani d/b/a All Discount Signs, Appellees*, 771 S.W.2d 703 (Tex. App.--Houston [14th Dist.] 1989) was charged to the Sign Permitting Fund, which in turn derives its revenue from permit and license fees charged to sign owners and operators.

85. The *DeTrapani* case involved admitted mistakes by the Sign Administration in ordering removal of

portable signs, and then refusing to allow the mistakes to be rendered by replacing the signs.

86. The cost of the *DeTrapani* settlement is chargeable exclusively to sign owners and operators through the Sign Permitting Fund, rather than to the general public through the General Fund. As such, these signs owners and operators, like Plaintiffs, will subsidize the cost of the *DeTrapani* settlement for the benefit of the general public, who receive just as much benefit from this settlement without any charge.

87. If the Plaintiffs prevail in this case and are awarded monetary damages, such damages would be chargeable to the Sign Permitting Fund.

88. The attorney's fees incurred by the City in defending this case are chargeable to the Sign Permitting Fund, even if the City loses the case.

89. The City's attorneys' fees in defending any litigation over sign issues, including the *DeTrapani* case, are chargeable to the Sign Permitting Fund, which in turn derives its revenues from permit and license fees charged to sign owners and operators like Plaintiffs.

90. For fiscal year 1990, the interfund billing by the City Legal Department to the Sign Administration was $152,326.25.

91. The $725,000.00 in loans from the General Fund to the Sign Permitting Fund are interest-bearing, and such interest is also chargeable to the Sign Permitting Fund.

92. Once again, by charging the City's attorneys' fees for defending litigation over sign issues and interest on loans to the sign owners and operators like Plaintiffs through the Sign Permitting Fund, the City will be forcing Plaintiffs to subsidize these costs for the benefit of the general public, who receive just as much benefit without any charge.

93. The City's Building Inspection Division is analogous to the Sign Administration in the sense that both provide inspections, investigations, and issue permits to ensure safety, aesthetics, and otherwise comply with the City's regulations on buildings and signs, respectively.

94. The services provided by the Building Inspection Division were paid for by the general public out of the General Fund prior to 1989 (currently out of a Special Revenue Fund); whereas, the services provided the Sign Administration have been and are currently paid for exclusively by sign owners and operators out of the Sign Permitting Fund.

95. The Building Inspection Division has never needed to borrow money from the City; whereas, the Sign Administration had to borrow $725,000.00 over the last four years from the City in order to remain self-sufficient.

96. Since real estate signs are a category distinct from off-premise signs and the Sign Code currently contains a separate permit fee for erecting and operating them ($100.00 each), it was improper to combine real estate signs with off-premise signs in determining costs and fees.

97. There is not a direct relationship between the payment of fees charged by the City for off-premise operating permits and the receipt of services of off-premise operating permits; therefore, the revenues generated for the

City by off-premises operating permits exceed its reasonable cost of rendering this service.

98. A reasonable cost for rendering the service for an off-premise operating permit is $40.00, and any amount thereafter is excessive as more than the mere recoupment of reasonable regulation costs.

99. Plaintiffs originally filed this case on January 9. 1987.

100. On July 14, 1989, Plaintiffs filed their First Amended Petition, containing complaints about excessive off-premise operating permit fees, which was not wholly based on a new, distinct, or different transaction or recurrence alleged in Plaintiffs' Original Petition.

101. From January 9, 1985 through July 27, 1992, Plaintiffs have made the following payments of off-premise operating permit fees:

	No. Permits	Total Amount Paid	Average Amount Per Permit
1985	1005	$ 66,907.92	$ 66.58
1986	5287	$ 407,729.65	$ 77.12
1987	161	$ 13,441.60	$ 83.49
1988	2393	$ 215,222.54	$ 89.94
1989	3976	$ 632,647.74	$ 159.12
1990	137	$ 21,696.14	$ 158.37
1991	3248	$ 551,979.30	$ 169.94
1992	1235	$ 191,168.53	$ 154.79
Totals:	17,442	$2,100,793.42	$ 120.44

102. The average permit fee paid by Plaintiffs between 1985 and 1992 was $120.44, and the total number of permits issued during that time was 17,442.

103. At $40.00 as the reasonable cost of rendering the service for an off-premise operating permit, Plaintiffs actually paid $1,403,034.40 over such cost between 1985 and 1992 ($120.44 minus $40.00 times 17,442).

104. A portion of the off-premise operating permit fees paid by the Plaintiffs between 1985 and 1992 was placed into the Court Registry, i.e., $682,860.42 (plus $68,872.51 in interest through July, 1992).

105. The $2,100,793.42 paid by the Plaintiffs, including the excessive portion of $1,403,034.40, was done so under protest and duress, and not voluntarily.

106. At $40.00 as the reasonable cost of rendering the service for an off-premise operating permit, Plaintiffs made the following payment for off-premise operating permit fees over such cost during the indicated time frame:

Time Frame	Ave. Fee Pd.	-	$ 40.00 Reasonable Fee	x	No. of Permits	=	Total Amount Paid Over Reasonable Fee
1/9/85-1/9/87	$ 75.43	-	$40.00	x	6292	=	$ 222,925.56
1/9/87-7/14/87	$ 83.49	-	$40.00	x	161	=	$ 7,001.89
7/14/89-7/27/92	$162.57	-	$40.00	x	8596	=	$1,053,611.70

107. The Sign Code contains penalties for the late and non-payment of off-premise operating permit fees, including fines of up to $200.00 per day per violation.

108. There is no provision in the Sign Code for obtaining a refund of off-premise operating permit fees determined to be excessive.

109. Plaintiffs incurred cost and attorneys' fees of $326,582.96 in connection with the prosecution of their claims against the City arising from allegedly excessive off-premise operating permit fees through trial.

110. $326,582.98 is a reasonable and necessary figure for cost and attorneys' fees in Houston, Harris County, Texas, for the Plaintiffs' prosecution of claims against the City arising from the allegedly excessive off-premise operating permit fees through trial.

111. In the event of appeal, reasonable and necessary conditional appellate attorneys' fees for the Plaintiffs are as follows: $35,000.00 through the Court of Appeals, $15,000.00 for writ of error to the Texas Supreme Court; and an additional $10,000.00 if the writ of error is granted.

CONCLUSIONS OF LAW

1. A portion of the City's off-premise operating permit fee constitutes an occupation tax, as the revenue generated by off-premise operating permit fees exceeds the reasonable costs of regulation for off-premise operating permits. *See Hurt v. Cooper*, 110 S.W.2d 896 (Tex. 1937); *City of Fort Worth v. Gulf Refining Co.*, 83 S.W.2d 610 (Tex. 1935); *Producers' Association of San Antonio v. City of San Antonio*, 326 S.W.2d 222 (Tex. Civ. App. -- San Antonio, 1959, writ ref'd n.r.e.).

2. As $40.00 represents the charge for recouping the reasonable costs of regulation for an off-premise operating permit, all sums levied in excess thereof are general revenue raising measures and an occupation tax. *Id.*

3. The State of Texas has not levied an occupation tax on the off-premise sign industry.

4. Since Article VIII, §1(f) of the Texas Constitution prohibits cities from levying occupation taxes where the State has not done so, the City may not levy an occupation tax on the off-premise sign industry.

5. Since a portion of the City's off-premise operating permit fee constitutes an occupation tax, the City has violated the Texas Constitution. *Tex. Const.*, art. VIII, §1(f).

6. The City has also violated Plaintiffs' rights to due process secured under the 14th Amendment to the United States Constitution by failing to refund the portion of off-premise operating permit fees paid under duress that have been determined to be unconstitutionally excessive. *See McKesson v. Division of Alcoholic Beverages & Tobacco*, 110 S.Ct. 2238 (1990).

7. By unconstitutionally levying an occupation tax on the outdoor advertising industry, which provides a medium for the expression of commercial and non-commercial messages and is therefore a member of the press, the City has also violated the guaranty of the freedom of the press under the 1st Amendment to the United States Constitution. *See Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 103 S.Ct. 1365 (1983).

8. The City has also violated the Due Process Clauses of the 5th and 14th Amendments to the United States Constitution and Article I, Section 19 of the Texas Constitution when a portion of its off-premise operating permit fee is so excessive that it is an unconstitutional occupation tax, arbitrary, and confiscatory of Plaintiffs' property. *See Gwinn Area Community Schools v. State of Michigan*, 741 F.2d 840 (6th Cir. 1984); *Houston Credit Sales Co. v. City of Trinity*, 269 S.W.2d 579 (Tex. Civ. App. -- Waco 1954, writ ref'd n.r.e.).

9. By discriminating against off-premise operating permit holders, and forcing them to subsidize on-premise operating permit holders as well as the general public, the City has also violated Plaintiffs' rights under the Equal Protection Clause of the 14th Amendment to the United States Constitution. *See Parhan v. Hughes*, 99 S.Ct. 742 (1979); *Sullivan v. University Interscholastic League*, 616 S.W.2d 170 (Tex. 1982); *Prudential Healthcare Plan v. Commissioner of Insurance*, 626 S.W.2d 822 (Tex. App. -- Austin 1981, writ ref'd. n.r.e.).

10. The City has violated and is liable to Plaintiffs under the Civil Rights Act, 42 U.S.C. §1983. Specifically, the City acted under color of law by passing and enforcing ordinances establishing illegally excessive off-premise operating permit fees, thereby depriving Plaintiffs of several of their rights, privileges, and immunities secured by the Constitution. As such, Plaintiffs are entitled to redress their injuries in an action at law, suit in equity, or other proper proceedings against Defendants.

11. Plaintiffs' First Amended Petition, which was filed on July 14, 1989 and contains among other things complaints about unconstitutionally excessive off-premise operating permit fees, is not wholly based on a new, distinct, or different transaction or occurrence contained in Plaintiffs' Original Petition, filed on January 9, 1987, and it therefore "relates back" to such original petition for limitations and calculation of damage purposes under Section 16.068 of the Civil Practice & Remedies Code.

12. Plaintiffs are entitled to recover from Defendants in an action at law their actual damages, representing the amount of unconstitutionally excessive off-premise operating permit fees they paid between January 9, 1985 and July 27, 1992 (this case having been filed on January 9, 1987, and the

statute of limitations under the Civil Rights Act in Texas being two years).

13. Plaintiffs are also entitled to recover their reasonable and necessary costs and attorneys' fees in prosecuting their civil rights claims against Defendants, pursuant to Section 1988 of the Civil Rights Act.

14. Plaintiffs are entitled to recover from Defendants their costs of court incurred in prosecution of this action, pursuant to Texas Rule of Civil Procedure 131.

SIGNED this 8th day of October, 1992.

/s/ Louis M. Moore
JUDGE PRESIDING

STATE OF TEXAS
COUNTY OF HARRIS

I, Charles Bacarisse, District Clerk of Harris County, Texas, do hereby certify that the foregoing data is a true and correct copy of the original record, now in my lawful custody and possession as appears of record in my office and/or:
a) filed on _____
b) recorded under Vol. 6969 Page 419
in the Minutes of said Court
c) abstracted from the original record in my lawful possession, electronically, stored in digital form and pertaining to the _____
in reference to cause number _____, or
d) abstracted from the original record in my lawful possession, electronically, stored in digital form pertaining to _____ from _____ to the present date.

Witness my official hand and seal of office this JUN 01 1995

CHARLES BACARISSE, DISTRICT CLERK
Harris County, Texas

By /s/ S. Batts Deputy
S. BATTS

APPENDIX C

FOURTEENTH COURT OF APPEALS
Houston, Texas

August 4, 1994

Hon. Gilbert D. Douglas
Hon. Andrea Chan
Senior Assistant City Attorney
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Hon. Marie R. Yeates
Hon. Penelope E. Nicholson
Vinson & Elkins
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Hon. David M. Gunn
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Houston, TX 77002

Hon. Russell H. McMains
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Corpus Christi, TX 78401

RE: CASE NO. 14-92-01123-CV
TRIAL COURT CASE NO. 87-00827

STYLE: City of Houston, Texas, Et Al
V: Harris County Outdoor Advertising Association

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Tuesday, September 6, 1994.

MARY JANE SMART, CLERK

By /s/ Charlene Mitchell
Chief Deputy

THE STATE OF TEXAS
COUNTY OF HARRIS

I, MARY JANE SMART, Clerk of the Fourteenth Court of Appeals, of the State of Texas, at Houston, do hereby certify that the preceding 1 page(s) contain a true and correct copy of Court's Order Overruling Appellants' Motion for Rehearing in the Cause No. A14-92-01123-CV,
City of Houston, Et Al., Appellants

VS.

Harris County Outdoor Advertising Association, Et Al, Appellees
from Harris County, and now do file in my office.

TO CERTIFY WHICH, I hereunto set my hand and affix the Seal of said Court of Appeals, at Houston this the 30th day of May, 1995.

MARY JANE SMART Clerk
By /s/ Alexander Torres Deputy

APPENDIX D

THE SUPREME COURT OF TEXAS
Post Office Box 12248 Austin, Texas 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

CHIEF JUSTICE
Thomas R. Phillips

CLERK
John T. Adams

JUSTICES
Raul A. Gonzalez
Jack Hightower
Nathan L. Hecht
John Cornyn
Bob Gammage
Craig Enoch
Rose Spector
Pricilla R. Owen

EXECUTIVE ASS'T.
William L. Willis

ADMINISTRATIVE ASS'T.
Nadine Schneider

I, JOHN T. ADAMS, CLERK OF THE SUPREME OF TEXAS, as official custodian of the records of said court, do hereby certify that the attached two(2) pages are a true and correct copy of the disposition letter denying writ in CITY OF HOUSTON ET AL. v. HARRIS COUNTY OUTDOOR ADVERTISING ASSOCIATION ET AL. (94-0794) issued by the Supreme Court of Texas on February 16, 1995, as the same appears of record in said Court under the date shown.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 1st day of June 1995.

JOHN T. ADAMS, CLERK

By /s/ Mia Zierlein
Mia Zierlein, Deputy Clerk

THE SUPREME COURT OF TEXAS
P. O. BOX 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February 16, 1995

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RE: Case Number 94-0794

Style: CITY OF HOUSTON ET AL.
V.
HARRIS COUNTY OUTDOOR ADVERTISING ASSOCIATION ET AL.

Dear Counsel:

The application for writ of error in the above-styled case was this day denied with the notation, Writ Denied.

Chief Justice Phillips not sitting.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin
Blanca E. Morin, Deputy

APPENDIX E

THE SUPREME COURT OF TEXAS
POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
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FAX : (512) 463-1365

CHIEF JUSTICE
THOMAS R. PHILLIPS

CLERK
JOHN T. ADAMS

JUSTICES
RAUL A. GONZALEZ
JACK HIGHTOWER
NATHAN L. HECHT
JOHN CORNYN
BOB GAMMAGE
CRAIG ENOCH
ROSE SPECTOR
PRISCILLA R. OWEN

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
NADINE SCHNEIDER

I, JOHN T. ADAMS, CLERK OF THE SUPREME OF TEXAS, as official custodian of the records of said court, do hereby certify that the attached two (2) pages are a true and correct copy of the disposition letter overruling the motion for rehearing in CITY OF HOUSTON ET AL. v. HARRIS COUNTY OUTDOOR ADVERTISING ASSOCIATION ET AL. (94-0794) issued by the Supreme Court of Texas on March 23, 1995, as the same appears of record in said Court under the date shown.

IN TESTIMONY WHEREOF, Witness my hand and the seal

of the Supreme Court of Texas,
at the City of Austin, this,
the 1st day of June 1995.

JOHN T. ADAMS, CLERK
By /s/ Mia Zierlein
Mia Zierlein, Deputy Clerk

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

March 23, 1995

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RE: Case Number 94-0794
Style: CITY OF HOUSTON ET AL.
v.
HARRIS COUNTY OUTDOOR ADVERTISING ASSOCIATION ET AL.

Dear Counsel:

The motion for rehearing in the above referenced application for writ of error was this day overruled.

Chief Justice Phillips not sitting.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin
Blanca E. Morin, Deputy

(2)

NO. 94-2099

Supreme Court, U.S.
FILED
AUG 22 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THE CITY OF HOUSTON, ET AL.,
Petitioners,
v.
HARRIS COUNTY OUTDOOR ADVERTISING ASSOCIATION, ET AL.,
Respondents.

Petition for Writ of Certiorari To the Texas Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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19pp

QUESTIONS PRESENTED

1. Did the Texas Court of Appeals incorrectly decide an important issue of federal law, in a manner contrary to the United States Supreme Court precedent when it affirmed the judgment of the trial court holding that Defendants had violated Plaintiffs' rights to procedural due process under the Fourteenth Amendment?

2. Were there any other grounds adequate to support the Texas Courts' judgments under 42 U.S.C. §1983 or the award of attorney's fees under 42 U.S.C. §1988?

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I. THE APPELLATE COURT'S DECISION THAT THERE WAS NO "CLEAR AND CERTAIN" RELIEF AVAILABLE TO THE PLAINTIFFS IS SUPPORTED BY "ADEQUATE AND INDEPENDANT" STATE LAW. 3

(a) *McKesson* requires taxpayers be given a "clear and certain" remedy for unlawfully assessed taxes. 4

(b) The appellate court's holding that Plaintiffs had no meaningful opportunity to obtain "clear and certain" relief is based on state, not federal law. 5

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NO. 94-2099

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THE CITY OF HOUSTON, ET AL.,
Petitioners,

v.

HARRIS COUNTY OUTDOOR ADVERTISING ASSOCIATION, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

To the Honorable Supreme Court of the United States:

The Harris County Outdoor Advertising Association, et al. ("Plaintiffs"), Respondents herein, file their response to the Petition for Writ of Certiorari filed by the City of Houston, et al. ("Defendants"), Petitioners herein, and respectfully present as follows:

STATEMENT OF THE CASE

The trial court in this case initially determined that the so called permit fees imposed by Defendants on Plaintiffs were in actuality occupation taxes that violated the Texas Constitution. The trial court also found that Defendants assessed and collected the unlawful occupation

tax on Plaintiffs without providing either a pre-deprivation or a post-deprivation remedy including "clear and certain" relief from the unlawful taxes paid. On authority of *McKesson v. Division of Alcoholic Beverage & Tobacco*, 496 U.S. 18 (1990), the trial court concluded that this failure to offer meaningful relief from the unlawful taxes violated Plaintiffs' procedural due process rights under the Fourteenth Amendment to the United States Constitution. This finding of a federal constitutional deprivation without adequate state remedy was the basis for Plaintiffs' recovery under the Civil Rights Act, 42 U.S.C. §§ 1983 and 1988. The trial court's decision was affirmed by the Texas Fourteenth Court of Appeals, *Harris County Outdoor Advertising Ass'n v. City of Houston*, 879 S.W.2d 322 (Tex. Civ. App.—Houston [14th Dist.] 1994, writ denied), and the Supreme Court of Texas declined to review the case.

It is undisputed that the appellate court's finding that the Defendants assessed an unlawful occupation tax is a state law question beyond this Court's review, and Defendants in fact do not seek review of this issue. Instead, they challenge the trial court's findings that Defendants violated Plaintiffs' federal constitutional rights to procedural due process.[1]

Close reading of Defendants' Petition for Writ of Certiorari shows that, contrary to their contention that the appellate court's decision "incorrectly resolved an important issue of federal law," Petition for Writ of Certiorari (hereinafter "Petition") at 5, Defendants contend that the appellate court misinterpreted Texas law when it held that there was no adequate state remedy providing "clear and certain" relief from the unlawful taxes. Petition at 9 (stating

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1 **The trial court also found that Defendants violated Plaintiffs' rights to substantive due process, First Amendment rights to free speech and free press, and equal protection of the laws. Petition at 54a-55a.**

that "it is clear that the State of Texas recognizes the right of a taxpayer to seek a refund of unlawfully assessed municipal taxes."). Because of this incorrect reading of state law, Defendants argue, the appellate court reached the wrong *result* after applying the *McKesson* test.

The appellate court's holding that Texas has neither a pre-deprivation nor a post-deprivation procedure for Plaintiffs to obtain a refund of the unlawful taxes rests on independent and adequate state grounds. Furthermore, the argument that Texas in fact has such procedures was not raised by Defendants until the Motion for Rehearing in the appellate court, and was therefore neither pressed nor passed upon below. Finally, the trial court was correct in concluding that Defendants also violated Plaintiffs' rights to free speech and freedom of the press under the First Amendment and substantive due process and equal protection of the laws under the Fourteenth Amendment. For these reasons, this Court should deny Defendants' Petition for Writ of Certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE APPELLATE COURT'S DECISION THAT THERE WAS NO "CLEAR AND CERTAIN" RELIEF AVAILABLE TO THE PLAINTIFFS IS SUPPORTED BY ADEQUATE AND INDEPENDENT STATE GROUNDS

Defendants contend that this Court should grant certiorari because the appellate court below misapplied this Court's holding in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). Petition at 6. However, close analysis of the Petition reveals that

Defendants are actually using this contention in an improper attempt to persuade this Court to review and reverse the appellate court's finding under Texas law that the Defendants failed to provide any remedy to Plaintiffs for the unlawful occupation tax. Indeed, even the Defendants admit that the procedural due process claim turns on a question of state law. Petition at 8-9. When stripped of all pretense that this case raises important federal issues, the Defendants in the end argue that the appellate court reached the wrong result under *McKesson* because it incorrectly decided a question of state law. Because this Court has historically declined to review questions of state law, see *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (holding that the state courts "are the ultimate expositors of state law"), the Court should deny the Petition for Writ of Certiorari.

(a) ***McKesson* requires taxpayers be given a "clear and certain" remedy for unlawfully assessed taxes.**

When a state places a taxpayer under duress promptly to pay a tax when due, the Fourteenth Amendment Due Process Clause requires that state to provide a fair opportunity for a taxpayer to challenge the accuracy and legal validity of the tax obligation and a "clear and certain remedy" for any erroneous assessment. *McKesson*, 496 U.S. at 39. Federal law provides flexibility to the states, allowing them to craft a remedy featuring either a pre-deprivation procedure, a post-deprivation procedure, or a hybrid between the two. *Reich v. Collins* , ___ U.S. ___, 115 S.Ct. 547, 550 (1994). However, the state must meet *McKesson's* two-pronged test by (a) providing a remedy to challenge the tax that (b) offers "clear and certain" relief should the tax prove to be excessive or unlawful. *McKesson*, 496 U.S. at 39. What remedy the state provides, if any, requires an interpretation of state law, see *Reich*, ___ U.S. ___, 115

S.Ct. at 550, while the inquiry into whether that remedy provides the constitutionally mandated "clear and certain" relief is a federal question. *See Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499, 504 (1928) (holding due process gives taxpayers "an undoubted right to recover" unlawful tax funds exacted by duress).

(b) The appellate court's holding that Plaintiffs had no meaningful opportunity to obtain "clear and certain" relief is based on state, not federal law.

Here, the appellate court opinion turned on the initial inquiry in the *McKesson* analytical framework: Did the Defendants offer Plaintiffs some form of remedy for the unlawful occupation tax? The appellate court, interpreting the state law bearing on the question, correctly answered in the negative.[2] *See Harris County Outdoor Advertising*

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2 Throughout the trial in the case and on appeal, Defendants' sole argument opposing Plaintiffs' request for relief under 42 U.S.C. §§ 1983 and 1988 was that funds at issue were not excessive nor collected unlawfully. However, in their Motion for Rehearing to the Texas Court of Appeals, Defendants raised for the first time the defense that *Crow v. City of Corpus Christi*, 209 S.W.2d 922 (Tex. 1948) should be construed as offering Plaintiffs a constitutionally adequate state remedy for the unlawful taxation. Texas law, however, mandates that defenses not raised before the trial court are waived on appeal. *Larsen v. FDIC/Manager Fund*, 835 S.W.2d 66, 74 (Tex. 1992) (holding the FDIC may not raise the *D'Oench* doctrine on appeal when the issue was not raised at trial); *E. F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987) (holding a stockbroker may not raise assertion that the Texas Deceptive Trade Practices Act was inapplicable to securities transaction for the first time in Second Motion for Rehearing in the Court of Appeals).

Likewise, this Court has held that in cases originating in state court, an asserted federal claim will not be decided by this Court where

Ass'n., 879 S.W.2d at 333. Defendants seek certiorari from this Court to reverse this finding. *See* Petition at 9 (maintaining that "it is clear that the State of Texas recognizes the right of a taxpayer to seek a refund of unlawfully assessed municipal taxes" and that such a remedy is sufficient to meet due process under *McKesson*). However, even they acknowledge that this is a state law issue.

Defendants contention that the appellate court held that *McKesson* requires municipalities to "erect separate, administrative processes allowing regulated entities to challenge the validity of fees and taxes assessed" (Petition at 9) misstates the scope of that court's finding. Indeed, the appellate court's conclusion that "there was neither a pre-deprivation nor a post-deprivation procedure available for [Plaintiffs] to challenge the validity of [the] tax or to obtain 'clear and certain' relief...of the taxes paid," *Harris County Outdoor Advertising Ass'n.*, 879 S.W.2d at 333, not only

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the issue was "not pressed or passed upon below." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940). For example, in *Illinois v. Gates*, 462 U.S. 213 (1983), the Court refused to consider the State's assertion that the exclusionary rule should be modified to include a good faith exception where the defendant, at every level of the state court proceedings, (a) raised the claim that the Illinois police had violated his Fourth Amendment rights, and therefore (b) the evidence seized should be excluded, and where the State's only response in opposition was that no Fourth Amendment violation occurred. *Id.* at 220-222. This rule is applicable in this case where Plaintiffs asserted (a) that the off-premise permit fees were, in fact, unlawful occupation taxes, and (b) that Defendants violated their procedural due process rights by denying them a meaningful opportunity to challenge the tax and obtain a refund of any unlawful taxes paid, and Defendants' only response in opposition was that the off-premise permit fees were not unlawful occupation taxes. Because Defendants did not "press" the *Crow* defense to the trial or appellate court below, and those courts did not "pass upon" that question, this Court should decline to consider the argument.

conforms to the breath of potential remedies approved by *McKesson*, but also disputes the existence of the post-deprivation remedy Defendants belatedly assert exists.

Defendants do not contend that the appellate court misapplied *McKesson*, but that it reached the wrong result under *McKesson* because, in their view, it misread or wrongly interpreted a state law issue. Assuming without conceding that this is so, this Court should decline to review the appellate court's decision because that decision is supported by "adequate, and independent" state grounds. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

II.

DEFENDANTS VIOLATED PLAINTIFFS' FIRST AMENDMENT RIGHTS

Even if the trial and appellate courts below erred in finding that the Defendants did not offend Plaintiffs' procedural due process rights by levying and collecting the unlawful tax, the trial court correctly held that the unlawful tax on Plaintiffs' activities constituted a violation of Plaintiffs' First Amendment rights to free speech and freedom of the press.

Despite Defendants' wholly unsupported assertion to the contrary, see Petition at 12, there can be no doubt that Plaintiffs are protected by the First Amendment. *See City of LaDue v. Gilleo*, ___ U.S. ___, 114 S.Ct. 2038, 2041 (1994) ("[S]igns are a form of expression protected by the Free Speech Clause"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 524 (1981) (Brennan, J., concurring) (plurality opinion) (observing that a majority of the justices agree that "billboards are a medium of communication warranting First Amendment protection").

The First Amendment prohibits government from singling out protected activity for differential taxation absent a "compelling justification." *Leathers v. Medlock*, 499 U.S. 439, 447 (1991). The Defendants violated Plaintiffs' First Amendment rights by singling them out and levying against them an unlawful occupation tax without such a justification. More specifically, the tax applied only to off-premise sign operators with signs located in the Defendants' jurisdiction. The occupation tax is not the type of general taxation on First Amendment activity that has been approved by this Court. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586-87 n.9 (1983) (suggesting that subjecting First Amendment activity to a generally applicable sales tax would not be unconstitutional).

Defendants have at no time in this litigation, which began eight years ago, articulated a governmental interest justifying the occupation tax on the off-premise sign industry. As the *Minneapolis Star & Tribune Co.* Court explained, the goal of raising revenue, standing alone, cannot justify special tax treatment for the press, since the government can raise revenue by taxing businesses generally. *Minneapolis Star & Tribune Co.*, 460 U.S. at 586. Without an additional, compelling governmental interest, the tax is no more than a prohibited special tax on an activity protected from special taxation by the First Amendment. Defendants' violated Plaintiffs' First Amendment Rights by imposing and collecting such a tax.

Indeed, despite the lower court rulings to the contrary, Defendants still refuse to accept the trial court's finding that Defendants levied an illegal tax on Plaintiffs. Defendants characterize the First Amendment issue as being whether assessing a different permit fee against off-premise signs than is assessed against on-premise signs offends the First Amendment. Petition at 12. This depiction ignores the

fact that the state courts that have considered this case concluded that Defendants assessed and collected an unlawful tax on Plaintiffs, a conclusion that is not subject to further judicial review. Because this is an unlawful tax case, and not a legitimate permit fee case, *Minneapolis Star & Tribune Co.* applies.

By imposing an unconstitutional occupation tax on Plaintiffs, Defendants have impermissibly burdened an activity protected by the First Amendment without a compelling justification to do so. This justifies the trial court's finding that Defendants' conduct violated Plaintiffs' constitutional rights and supports the award of damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988.

III.

DEFENDANTS DEPRIVED PLAINTIFFS OF EQUAL PROTECTION OF THE LAWS

The Defendants misstate this Court's equal protection jurisprudence by asserting that *Metromedia, Inc.* allows them to levy a "higher permit fee" on off-premise permit owners than on on-premise permit fee owners. This reasoning again reveals the Defendants' misunderstanding of the issue raised in this case, which is: Did Defendants deny Plaintiffs equal protection of the law by levying the unlawful occupation tax against them?

Generally, a tax will survive an equal protection challenge if it rationally relates to a legitimate governmental interest. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 657 (1981). This inquiry ensures (1) that the government has a legitimate purpose for distinguishing among the groups affected by the tax, and (2) that the means chosen to effect that purpose are reasonably

related to it, and are not arbitrary and capricious. *Zobel v. Williams*, 457 U.S. 55, 61-64 (1982).

The tax levied by Defendants on Plaintiffs violates equal protection because it is arbitrary, capricious and contrary to state law. As such, the tax is similar to the tax that was held to violate the Equal Protection Clause in *Allegheny Pittsburgh Coal Co. v. County Comm'n.*, 488 U.S. 336 (1989). In *Allegheny Pittsburgh*, West Virginia landowners challenged the valuation placed on their property by the county assessor on equal protection grounds, contending that the assessment was excessive in light of the assessments placed on comparable surrounding properties. *Id.* at 338-39. The Court noted that a state is not prohibited from taxing different property at a different rate, provided the divisions and burdens are reasonable. *Id.* at 344. *See e.g., Allied Stores v. Bowers*, 358 U.S. 522, 526-27 (1959) (holding states may "impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products").

However, the West Virginia Constitution provided that the landowners' property must be taxed at a uniform rate throughout the state according to market value. *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 345. The Court found it significant that the West Virginia tax assessor acted on her own initiative, rather than according to the State's laws or policies, in assessing the landowners' property in a disparate manner. *Id.* at 345-46. Thus, the landowners were denied equal protection by the arbitrary and systematically excessive assessments levied by the tax assessor.

Likewise, the occupation tax levied by Defendants offends equal protection because it was levied arbitrarily, capriciously, and contrary to the law. Even if Defendants

could articulate a legitimate governmental purpose effected by the occupation tax—and Plaintiffs assert that no such legitimate purpose exists—the means chosen to achieve that purpose violate Plaintiffs' right to equal protection of the laws.

IV.

DEFENDANTS VIOLATED THE SUBSTANTIVE DUE PROCESS RIGHTS OF PLAINTIFFS BY ASSESSING A CONFISCATORY TAX

Federal courts have uniformly held that where a fee or tax is so arbitrary and excessive as to be confiscatory of the payor's property, it is invalid as a violation of the Substantive Due Process Clause of the Fourteenth Amendment. *Gwinn Area Community Schools v. State of Michigan*, 741 F.2d 840, 846 (6th Cir. 1984). The occupation tax was imposed in violation of state law, and was excessive in light of the proper and reasonable amount that should have been charged for the off-premise permit. *Harris County Outdoor Advertising Ass'n*, 879 S.W.2d at 332. Defendants charged Plaintiffs $179 for an off-premise operating permit that has a cost of only $19.73, a recovery rate of over 861 percent! Trial Court's Conclusion of Law No. 8. Petition at 54a. Thus, the tax was confiscatory and violative of due process.

V.

THE APPELLATE COURT CORRECTLY ASSESSED COSTS AND ATTORNEY'S FEES AGAINST DEFENDANTS

Defendants violated Plaintiffs' rights under the Procedural and Substantive Due Process Clauses and Equal Protection

Clause of the Fourteenth Amendment, and their First Amendment rights to freedom of speech and freedom of the press. In doing so, Plaintiffs properly recovered damages under 42 U.S.C. §1983. Section 1988 of the Civil Rights Act provides that a party that recovers under 42 U.S.C. 1983 is entitled to recover its reasonable attorney's fees and costs. Because the appellate court below was correct in finding Defendants liable under 42 U.S.C. §1983, the decision to award cost and attorney's fees to Plaintiffs under 42 U.S.C. §1988 should stand.

CONCLUSION

The appellate court decision below correctly interpreted and applied this Court's decisions in determining that Defendants were liable under Sections 1983 and 1988 of the Civil Rights Act. Therefore, this Court should deny the Petition for Writ of Certiorari.

Dated: August 22, 1995
Houston, Texas

Respectfully submitted,

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